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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1916

No. [redacted]29

FRANZ TEMPEL, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED JUNE 27, 1916.

(25,366)

(25,366)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 536.

FRANZ TEMPEL, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States court-room, in the City of Chicago, in said District and Division, before the Honorable George A. Carpenter, District Judge of the United States for the Northern District of Illinois, on Tuesday, the second day of June, being one of the days of the June Term of said Court, begun Monday, the first day thereof, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the United States of America the one hundred and thirty-eighth year.

Present: Honorable George A. Carpenter, Judge of said court, John J. Bradley, United States Marshal for said District, and T. C. MacMillan, Clerk of said court.

2 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

30363.

FRANZ TEMPEL
vs.
UNITED STATES.

Be it remembered, That heretofore to-wit: on the seventh day of April, 1911, came the petitioner in the above entitled cause by his attorney and filed in the clerk's office of said Court, his certain Petition in words and figures following to-wit:

3 *Petition for Claim under "The Tucker Act."*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the United States Circuit Court.

30363.

To the Honorable Judges of said Court:

Your petitioner, Franz Tempel, respectfully shows to your Honors:

1. That his full name is Franz Tempel, and his residence No. 1733 Wells Street in the City of Chicago in the District aforesaid.

2. That he is the owner seized in fee simple and in possession of real estate as hereinafter described, portions of which are now in the possession of the United States Government, of which portions he has been and is now being deprived of by said Government without receiving any compensation whatsoever therefor.

3. That the history of said premises in so far as it is relevant to this claim is as follows:

(*a*) In the year 1873 by partition suit in the Superior Court of Cook County the east half of the northeast quarter of Section Twenty-five (25), Township Forty (40), North, Range Thirteen (13), (except the south twenty (20) acres) was vested in one Harriet S. Jones, and so much thereof as lies northeast of the North Branch of the Chicago River was platted by the report of the Commissioners in said suit as Lot Eighteen (18) of the Snow Estate subdivision by Superior Court, Document No. 80819, which was recorded January 29th, 1873, in Book 3 of Plats, page 91, in the office of the Recorder of Cook County, Illinois;

(*b*) That afterward, said Lot Eighteen (18) having been by mesne conveyances vested in Judson M. W. Jones, he subdivided said Lot Eighteen (18) last above mentioned by a plat duly signed,
4 acknowledged and approved entitled, "Jones' North Branch Addition in Section 25, Town 40, North, Range 13, East of the 3rd P. M.," which was recorded in the office of the Recorder of Cook County, Illinois, September 15th, 1883, in Book 18 of Plats, page 50, as Document No. 494,887;

(*c*) That afterward your petitioner, by two warranty deeds from Harriet S. Jones, and Judson M. W. Jones, her husband, dated December 29th, 1888, and recorded March 25th, 1889, in Book 2509, page 173, and dated February 20th, 1889, and recorded March 25th, 1889, in Book 2509, page 172, respectively, with other property became seized in fee simple and in possession of Lots Sixteen (16), Seventeen (17) and Eighteen (18) in Block Two (2), and Lot Sixteen (16) in Block Four (4) in said Jones' North Branch Addition aforesaid, and also a portion of said Lot Eighteen (18) in said Snow Estate Subdivision, lying west of and adjoining said Lot Sixteen (16) in Block Four (4) aforesaid, and has ever since been the sole owner, paid the taxes assessed and levied thereon, and leased said property, and no other person or persons, firm or corporation has had any interest therein or entitled to possession of any portion thereof, with the possible exception of persons holding the relation to your petitioner of tenants.

4. That at all of said times above mentioned, except as hereinafter referred to, the North Branch of the Chicago River was a mere creek and used for no other purpose excepting that of surface drainage, and was not a navigable stream either in law or in fact; and that at the time of said purchase your petitioner had the premises above described surveyed by one Emil Rudolph, a competent surveyor in the City of Chicago, whereon the location of the edge of the water and the edge of the bank of the North Branch of the Chicago River distinctly appears.

5. That afterward the United States Government, under alleged authority of acts of Congress appropriating moneys for a channel twenty-one feet deep in said North Branch of the Chicago River to Belmont Avenue, entered upon the eastern portions of the land afore-

said, and in the latter part of the year 1909 completely ex-
5 cavated a channel through the same, and has ever since and now claims the possession thereof for the purpose of making navigable said North Branch of the Chicago River.

6. That the said United States Government has or claim to have appropriated to its own use and now holds possession of approximately the number of square feet of each of said lots respectively set opposite the same, viz:

Lot Sixteen in Block two,	2,100	square feet,
" Seventeen in Block Two,	2,450	" " ,
" Eighteen in Block Two,	4,250	" " ,
" Sixteen in Block Four,	24,300	" " ,

and also that portion of Lot Eighteen owned by your petitioner as aforesaid west and adjoining said last mentioned Lot Sixteen.

7. That the amount so held by the United States Government belonging to your petitioner is now being used by it for purposes of navigation, and your petitioner has received no compensation from said Government whatsoever therefor, and the same is reasonably worth the sum of thirty (30c.) cents per square foot;

8. That the claim of right whereby said Government holds in its said possession said land is by virtue of a Resolution passed by the General Assembly of the State of Illinois, adopted by the Senate of said state April 27th, 1897, and concurred in by the House of Representatives of said state April 23rd, 1897, found in the Session Laws of the State of Illinois for the year 1897 on page 231, and is in words and figures as follows:

"Be it Resolved by the Senate of the State of Illinois, the House of Representatives concurring therein: That the assent of the General Assembly of the State of Illinois be and the same is hereby given to the United States to acquire title to, by purchase or condemnation proceedings, in accordance with the laws of the United States and this State, and to hold and to possess all lands necessary for widening the Chicago River and its branches, as provided for by act of Congress entitled, 'An Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes,' which became a law, June 3, 1896, and the State of Illinois hereby cedes to the United States jurisdiction over any or all lands so acquired."

9. That the United States Government has never acquired title to said land so held in possession by it, either by purchase or
6 condemnation proceedings, and has never paid or tendered to your petitioner any sum of money as the equivalent of the value thereof, and your petitioner is entitled to damages for the amount of land in possession of said Government in the sum of Ten Thousand ($10,000.00) Dollars, the same being the reasonable value thereof.

10. That your petitioner has not at any of the times aforesaid lived in the vicinity of said premises, and was entirely ignorant of the acts and doings of said Government as aforesaid, until, on, to-wit: the 11th day of March, 1910, when he was informed by the

purchaser of premises which were a portion of his aforesaid purchase, viz: Lot Nineteen (19) in Block Two (2) aforesaid, of the existing conditions hereinbefore referred to, when he protested to the United States Government, demanding the full possession of his property aforesaid, which possession was by said Government refused him.

11. That hereto attached and marked "Exhibit A" is a map showing so much of said Jones' Subdivision as is in question, spread thereon the Emil Rudolph map above referred to, a map claimed to be the present line of the North Branch of the Chicago River, showing the result of dredging, and the present shore line shown by map made by Gustaf H. Carlson in 1910.

Wherefore, your petitioner prays judgment of this Honorable Court on the facts and the law, pursuant to the statute in such case made and provided.

FRANZ TEMPEL, *Petitioner.*

THOS. B. LANTRY,
Attorney for Petitioner.

STATE OF ILLINOIS,
County of Cook, ss:

Franz Tempel, being first duly sworn, on oath deposes and says that he has read the foregoing petition by him subscribed, and knows the contents thereof, and that the same is true in substance and in fact.

FRANZ TEMPEL.

7 Subscribed and sworn to before me this 6" day of April, A. D. 1911.

[SEAL.] VINCENT A. CORCORAN,
Notary Public.

Received a copy of the above this 6th day of April, 1911.

____ ____,
U. S. District Att'y.

(Here follows plat marked page 7½.)

8 (Endorsed:) Filed April 7, 1911. John H. R. Jamar, Clerk.

9 And afterwards to-wit: on the third day of November, 1911, came the United States by the United States District Attorney for the Northern District of Illinois, and filed in the clerk's office of said Court its certain Answer in words and figures following to-wit:

10 *Answer.*

In the Circuit Court of the United States of America for the Northern District of Illinois, Eastern Division.

FRANZ TEMPEL
vs.
UNITED STATES.

Answer.

And now comes the United States by James H. Wilkerson, United States Attorney for the Northern District of Illinois, and reserving all manner of exception which may be taken to the petition filed herein, answering says:

1. That it neither admits nor denies the allegations in the first, second and third paragraphs of said petition, and therefore calls for strict and legal proof thereof.

2. The defendant further answering says that it denies the allegation in the fourth paragraph of said petition to the effect that the north branch of the Chicago River was a mere creek, and used for no other purpose except surface drainage, and was not a navigable stream either in law or in fact, and says that the Chicago River was a navigable stream, both in law and in fact, at the times mentioned in said petition.

3. And the said United States further answering says that it neither admits nor denies the second allegation in the fourth paragraph of said petition with reference to an alleged survey by one Emil Rudolph, and therefore calls for strict and legal proof there

4. And the defendant further answering says that it denies that the United States under acts of Congress appropriated money for a channel in the north branch of the Chicago river to Belmont Avenue, and entered upon the eastern portions of the land afore-

11 said, and excavated a channel through the same, and ever since, and now, claims possession thereof: but admits that the said United States, under authority of acts of Congress, appropriating money for a channel in the north branch of the Chicago river to Belmont Avenue, did in the year 1909 excavate a channel in the Chicago river in the center of the stream and now claims possession thereof for the purpose of making more navigable the north branch of the Chicago River.

5. And the said defendant further answering says that it denies that it has appropriated, or claims to have appropriated, or holds possession of, the number of feet of ground alleged in said petition to have been in the possession of the petitioner herein, or any other amount of property except such soil as was found in the bed of the stream.

6. And the defendant further answering says that it denies that it has taken any amount of property alleged to have belonged to the petitioner herein, and admits that petitioner has received no compensation from the United States for any land alleged to have been taken from him by the said United States for purposes of navigation, as alleged in said petition, and neither admits nor denies that the value of the land alleged to have been taken from the petitioner by the United States was reasonably worth thirty cents per square foot, and calls for strict and legal proof thereof.

7. And the defendant further answering says that it denies the allegation alleged in paragraph eight of the petition herein.

8. And the defendant further answering says that it admits that it has never acquired title of the land alleged in said petition to have been wrongfully taken by the said United States from the said petitioner, either by purchase or condemnation, and has never tendered petitioner any sum of money, or the equivalent of the value of the said land, because it says that it has never at any time taken or acquired any of the land mentioned in the said petition, and it therefore denies that the petitioner is entitled to damages for the value of said land in the sum of ten thousand
12 dollars, or any other amount of money.

9. And the defendant further answering says that it neither admits nor denies any of the allegations in paragraphs ten and eleven of said petition, but calls for strict and legal proof thereof.

Wherefore the said defendant by its attorney aforesaid, prays the judgment of this honorable Court and a specific finding by the Court of the facts herein and the conclusions of the court upon all questions of law involved herein, and judgment thereon pursuant to the statute in such case made and provided.

THE UNITED STATES OF AMERICA,
By JAMES H. WILKERSON,
United States Attorney.

(Endorsed:) Filed Nov. 3, 1911. John U. R. Jamar, Clerk.

13 And afterwards to-wit: on the twenty-second day of March, 1912, came the petitioner in said entitled cause by his attorney, and filed in the clerk's office of the District Court of the United States for the Northern District of Illinois, his certain Replication, in words and figures following to-wit:

14 *Replication.*

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

FRANZ TEMPEL
vs.
UNITED STATES.

Replication.

The petitioner, saving and reserving unto himself all and all manner of advantage of exception to the manifold insufficiencies of the answer of the respondent herein, for replication thereunto, says, that he will aver and prove his said petition to be true, certain and sufficient in law to be answered unto; and that the said answer of the respondent is uncertain, untrue and insufficient to be replied unto by this petitioner: without this, that any other matter or thing whatsoever in said answer contained, material or effectual in law to be replied unto, confessed and avoided, traversed or denied, is true, all of which matters and things this petitioner is and will be ready to aver and prove as this Honorable Court shall direct, and humbly prays, as in and by his said petition he has already prayed.

THOS. B. LANTRY,
Attorney for Petitioner.

(Endorsed:) Filed March 22, 1912. T. C. MacMillan, Clerk.
[Endorsed:] Filed Mch. 22, 1912, at — o'clock — m. T. C. MacMillan, Clerk.

15 And afterwards to-wit: on the second day of June, 1914, there was filed in the clerk's office of said Court in said entitled cause, certain Findings of Fact, and certain Conclusions of Law. Said Findings of Fact and Conclusions of Law are respectively in words and figures following to-wit:

16 *Findings of Fact.*

UNITED STATES OF AMERICA,
Northern District of Illinois,
Eastern Division, ss:

In the District Court of the United States in and for said District.

No. 30363.

FRANZ TEMPEL
vs.
UNITED STATES.

Findings of Fact.

1. That the full name of the petitioner herein is Franz Tempel, and that his residence is Number 1733 Wells Street, in the City of Chicago, in the District aforesaid.

2. That the said Franz Tempel is the owner in fee simple in possession of the following described real estate:—

Lots Sixteen (16), Seventeen (17) and Eighteen (18) in Block Two (2) and Lot Sixteen (16) in Block Four (4) in Jones' North Branch Addition Subdivision of Section Twenty-five (25), Township Forty (40) North, Range Thirteen (13), East of the Third Principal Meridian, according to the plat recorded in the office of the Recorder of Cook County, Illinois, September 15, 1883, in Book 18 of Plats, page 50, as Document Number 494889; and also that part of Lot Eighteen (18) in Snow's State Subdivision by the Superior Court in Section Twenty-five (25), Township Forty (40) North, Range Thirteen, (13), East of the Third Principal Meridian, lying West and adjoining said Lot Sixteen (16) in Block Four (4) in said Jones' North Branch Addition.

3. That he acquired title thereto by two warranty deeds from Harriet S. Jones and Judson M. W. Jones, her husband, the first conveying said Lots in said Block Two (2), dated December 28, 1888, and recorded in the office of the Recorder of Cook County March 25, 1889, in Book 2509 of Records, page 172, and the second conveying the remainder thereof, dated February 20, 1889,
17 and recorded in the office of the Recorder of said County March 25, 1889, in Book 2509 of Records, page 172, and that he has ever since said purchase been the sole owner thereof, and no other person, firm or corporation has had any interest therein or title thereto, with the exception of persons holding the relation of tenant to said petitioner.

4. That said described premises lie along the North East bank of the North Branch of the Chicago River, some distance South of Belmont Avenue, in the City of Chicago, which is the North line of said Section Twenty-five (25).

5. That the North Branch of the Chicago River was originally

surveyed by the United States Government in 1837, and was about 150 feet wide where it crossed the section line along the east side of Section Twenty-five (25), Township Forty (40) North, Range Fourteen (14), which said line is now Western Avenue, and where said North Branch crosses said North line of said Section Twenty-five (25), which is now Belmont Avenue in the City of Chicago, said stream was about 50 feet wide.

6. That at the time of the purchase by the petitioner of the premises aforesaid he caused the same to be surveyed, and the edge of the bank and water line of said North Branch of said Chicago River to be shown on a map made by Emil Rudolph, a competent surveyor in the City of Chicago, which was introduced into evidence on the trial hereof, and that the water line as shown on said lots was indicated by said map, a copy of which is attached to these findings and made a part thereof for more specific information.

7. That the North Branch of the Chicago River, at the point where the same ran past the above described property in its natural state was a small surface stream, which in the Spring time would accommodate the floating of logs or the use or travel by canoes and row boats, and in the Summer there was very little water what-
18 soever but prior to 1889 the time of said purchase a channel had been dug in said North Branch of said river by riparian owners, and schooners had navigated the same to Addison Street, about a half a mile North of Belmont Avenue, and in 1892 a dock was built for Henry Rietz just West of Western Avenue, and South of said described property, and at that time the stream was dredged to accommodate boats of eight or nine feet breadth.

8. That after the purchase aforesaid the said petitioner leased said land to one Zapel for a brick yard, by the terms of which lease the said Zapel was privileged to dredge the bottom of the river in front of said premises for the purpose of making brick from the clay contained in said river, but he covenanted and was ordered not to interfere with the upland, and further covenanted to yield up said premises in the same condition as the same were demised.

9. That the said Zapel, without the consent or knowledge of said petitioner caused the superintendent of the dredging compay to dig away and through the upland of said petitioner, to the depth of, to-wit; Fourteen (14) feet, so that the same, after said digging away and through the upland of said petitioner was in some places sixty (60) feet in width, and varying depths from six (6) to fourteen (14) feet, as a result of which the water flowed over that portion thereof which was dug away by said dredging company as aforesaid; said dredging company was employed in so digging about thirty times during a period of five years, and each time dredged from two hours to four days, all of which was without the knowledge of said petitioner.

10. That the United States Government in 1896 passed an act to improve the North Branch of the Chicago River as far North
19 as Belmont Avenue, by dredging the same to admit passage of vessels drawing sixteen (16) feet of water, to-wit; seven-

teen (17) feet in depth, and afterwards by another act in 1899, provided for the survey and estimate of cost for a channel of twenty-one (21) feet as the project depth for the improvement, in lieu of that fixed by the act of 1896.

11. That during the years 1890 to 1899 the North Branch of the Chicago River, as far as Belmont Avenue was used by boats drawing from five (5) to eight (8) feet of water.

11½. That in 1896 the river in front of Tempel's property was in varying depth of from 6 feet to 15 feet as shown by the Sanitary District's soundings.

12. That the United States Government did not do any dredging North of Western Avenue until 1899, and in the year 1899 dredged a channel to the depth of seventeen (17) feet, some thirty (30) feet in width, as far North as Belmont Avenue, and subsequently in 1909 re-dredged to the depth of 21 feet and a width of sixty (60) feet, all by and under divers appropriations made by Congress for such purpose between 1898 and 1909.

13. That in deepening said Channel the said United States Government surveyed and located the same upon the submerged land of the petitioner where the same had been dredged by the superintendent of the dredging company, as hereinbefore set forth.

14. That the said petitioner had no knowledge whatsoever of any of the dredging either by the said McCarthy or by the United States Government as aforesaid, nor the locating of the river upon his property until some time in February, 1910, and that he immediately made a demand upon the Government for the possession of his property, which was refused.

15. That no compensation has been made to the petitioner by the United States Government, or by any one for them to the petitioner at any time for the land taken as aforesaid.

20 16. That by reason of the changes in said river as aforesaid, the difference between the value of the premises of the petitioner at the time when he purchased the same as aforesaid, and the value of the same at the time that the demand as hereinbefore set forth was made, less the cost of reclaiming the same, were he entitled to make reclamation thereof is $7,547.00.

17. That the petitioner filed his petition herein under the so called Tucker Act on the 6th day of April, 1911, praying for the damages to him for the land taken by the Government as aforesaid.

18. That no objection was ever made by the petitioner herein, Franz Tempel, to the use of the river in front of his property for public navigation, nor was any complaint as to the dredging of 1899 ever filed by him. Said Tempel not knowing that a part of the navigable channel ran over the land which had been occupied by Zapel.

19. That during this period of ten years from 1899 to 1909 the North Branch of the Chicago River, including that portion of it in front of the Tempel property was in constant and increasing use for the purpose of public navigation.

20. That A. T. Grohmann, Government Engineer, under the di-

rection of Lieutenant Colonel George A. Zinn, Corps of Engineers, United States Navy, made a survey in July, 1909, prior to the second dredging by the Government, and a second survey in May, 1911, a year and a half after the dredging, which two surveys showed only two small changes in the shore line along the Tempel property; in these instances a small portion had been washed away by erosion.

Found:

CARPENTER, *Judge.*

2 June, 1914.

(Here follows plat marked p. 20½.)

21 (Endorsed:) Filed June 2, 1914, T. C. MacMillan, Clerk.

22 *Conclusions of Law.*

UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division:

No. 30363.

FRANZ TEMPEL
v.
UNITED STATES.

Conclusions of Law.

The court adopts the following conclusions of law:

I. The North Branch of the Chicago River in its natural state was a navigable stream;

II. The North Branch of the Chicago River, between Western Avenue and Belmont Avenue, was navigable in fact as early as 1889;

III. No claim for land taken as a result of the dredging by the United States Government in 1899 can be heard in this suit for the reason that this being a petition under the Tucker Act the six year limitation of that Act is a jurisdictional requirement, and accordingly no claim arising prior to 1905 can be here considered;

IV. No land belonging to Franz Tempel was taken by the United States Government as a result of the dredging of 1899 within the meaning of the fifth Amendment to the Constitution of the United States;

V. No land belonging to Franz Tempel was taken by the United States Government as a result of the dredging of 1909 within the meaning of the Fifth Amendment to the Constitution of the United States;

VI. The petitioner herein having failed to complain of the use by the public of the stream in front of his property as a river navigable in fact for a period of at least ten years prior to the
23 first dredging by the United States Government in 1899 is estopped from thereafter disputing the navigability of said river;

VII. The title to the bed of the North Branch of the Chicago River in front of Tempel's property, whether in the State of Illinois or Franz Tempel, was subject to an easement in favor of the United States Government, and that any damages, caused by the dredging of said bed, to the bank along the shore line of said Tempel, are only incidental and consequential, for which the United States Government is not answerable in damages.

VIII. Said Tempel as a riparian owner along a navigable stream must himself bear the loss of any wearing away of his bank by erosion.

IX. The North Branch of the Chicago River in front of Tempel's

property being a navigable stream the dredging of the bottom of the river bed by the United States Government in 1899 did not constitute a taking within the meaning of the Fifth Amendment to the Constitution of the United States.

X. The North Branch of the Chicago River in front of Tempel's property being a navigable stream the dredging of the bottom of the river bed by the United States Government in 1909 did not constitute a taking within the meaning of the Fifth Amendment to the Constitution of the United States.

CARPENTER, *Dist. Judge.*

2 June, 1914.

(Endorsed:) Filed June 2, 1914. T. C. MacMillan, Clerk.

24 And on the same day to-wit: the second day of June, 1914, there was filed in the clerk's office of said Court, certain Petitioner's Requested Findings of Fact, marked by the trial Judge "Refused", the same being in words and figures following to-wit:

25 *Petitioner's Requested Findings of Fact.*

UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division, ss:

In the District Court of the United States in and for said District.

No. 30363.

FRANZ TEMPEL
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UNITED STATES.

The petitioner requests the court to make the following findings of fact:

1. That the value of the artificially submerged land taken by the United States Government for the purpose of a navigable channel under the various acts of Congress affecting the North Branch of the Chicago River is of the value of $7,547.00.

2. The court finds the damages of the petitioner herein to be $7,547.00.

Refused.

CARPENTER, *Judge.*

2 June, 1914.

(Endorsed:) Filed June 2, 1914. T. C. MacMillan, Clerk.

26 And on the same day to-wit: the second day of June, 1914, there was filed in the clerk's office of said court in said entitled cause, certain Petitioner's Conclusions of Law, marked by the trial Judge, "Refused", the same being in words and figures following to-wit.

27 *Petitioner's Conclusions of Law.*

UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division, ss:

In the District Court of the United States in and for said District.

No. 30363.

FRANZ TEMPEL
vs.
UNITED STATES.

Conclusions of Law.

The court makes the following conclusions of law herein:

1. That the United States Government has taken for public use the property of the petitioner of the value of $7,547.00, without first making just compensation to him therefor.

2. That the United States Government, by taking the property of the petitioner for public use, without first making just compensation to him therefor, by virtue of the Fifth Amendment of the Constitution of the United States entered into an implied contract to pay the petitioner for the value thereof whenever the petitioner approved of and accepted of the taking.

3. That the petitioner did not lose his right to compensation for the taking of his property by the Government without compensation until twenty (20) years had elapsed from the time of the taking.

4. That the right of the petitioner to file his suit accrued within six (6) years from the time the same commenced.

5. That the petitioner is entitled to a finding of his damages against the United States for the sum of $7,547.00 and to judgment thereon.

Refused:

CARPENTER, *Judge.*

2 June, 1914.

(Endorsed:) Filed June 2, 1914. T. C. MacMillan, Clerk.

28 And on the same day to-wit: the second day of June, 1914, in the record of proceedings thereof in said entitled cause, before the Hon. George A. Carpenter, Judge of said Court, appears the following entry to-wit:

30363.

FRANZ TEMPEL
vs.
THE UNITED STATES OF AMERICA.

Now come the parties by their respective attorneys and the Court having heretofore heard arguments of counsel upon the findings of

fact and conclusions of law and being now fully advised in the premises, finds the issues for the defendant, and it is ordered that the findings of fact and conclusions of law presented on behalf of the defendant be and the same are hereby allowed, and the clerk is directed to file the same.

It is thereupon Considered and Adjudged by the Court that the defendant have and recover of and from said plaintiff its costs and charges in this behalf expended and that execution issue therefor. It is further ordered by the Court that the plaintiff have sixty days in which to present and file his bill of exceptions and bond on writ of error is fixed at the sum of two hundred and fifty dollars ($250.00).

29 And afterwards to-wit: on the sixteenth day of July, 1914, in the record of proceedings thereof in said entitled cause, before the Hon. Kenesaw M. Landis, Judge of said Court, appears the following entry towit:

30363.

FRANZ TEMPEL
vs.
THE UNITED STATES OF AMERICA.

Now come the parties herein by their attorneys and upon motion of the defendant, It is ordered by the Court that the time for the defendant to file bill of exceptions herein be extended sixty days from August 1st.

30 And on to-wit: the twenty-fifth day of September, 1914, there was filed in the clerk's office of said Court, in said entitled cause a certain Bill of Exceptions in words and figures following to-wit:

31 *Bill of Exceptions.*

UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division, ss:

In the District Court of the United States in and for said District and Division.

No. 30363.

FRANZ TEMPEL
vs.
UNITED STATES.

Bill of Exceptions.

Be it remembered that heretofore, upon the hearing in the above entitled matter, had before His Honor, George A. Carpenter, one

of the judges of said court, at which said hearing, in addition to the evidence upon which the court based the findings of fact herein, the following proceedings were had.

There were present Thomas B. Lantry, representing the petitioner, and James H. Wilkerson and Allan J. Carter, representing the respondent.

The following evidence was offered and adduced as to the value of the property claimed by the petitioner to have been taken by the respondent, as in the petition herein set forth, viz:

JOHN S. DONNELLY, called as a witness on behalf of the petitioner, being first duly sworn, testified as follows:

I have been in the real estate business for over 30 years. I handled the Egan estate for about 12 years. I was with H. O. Stone & Company for nearly 10 years, and I have been a real estate expert for the City for the last three years, and am still with the City. I have made a specialty of manufacturing
32 property having rail and river connections, and I am familiar with the values of river properties both on the North and South Branch of the Chicago River.

I negotiated the sale for Mr. Tempel while with H. O. Stone & Company in the year 1909, of Lot 19 in Block 2 in Jones' North Branch Addition, and am familiar with the value of the property at that time, and also in 1889. It is customary in selling river frontage to sell it by actual lot measurement on a square foot valuation, even though a portion of it may be under water. Taking into consideration the condition of Lot 16 in Block 4, and Lots 16, 17 and 18 in Block 2 in Jones' North Branch Addition as it was in 1899 and in 1909, the same being under water, with the right to fill in the submerged land, I am of the opinion that the reasonable value of the submerged land of said lots was worth at least 25¢ a square foot.

GUSTAF CARLSON, a witness called on behalf of the petitioner, being first duly sworn, testified as follows:

I am a surveyor in the City of Chicago, and have been in that business for upwards of ten years. I have calculated the area of land taken off of Lots 16, 17 and 18 in Block 2 and Lot 16 in Block 4 in Jones' North Branch Addition described in the petition herein, by the location of the channel as described in the findings of fact, to be Thirty Thousand One Hundred eighty-eight (30,188) square feet.

Which was all the evidence offered or adduced by either party upon the subject of the value of the land claimed to be taken, as set forth in the petition.

33 And thereupon the petitioner requested the court to make the following finding of fact, viz:

"1. That the value of the artificially submerged land taken by the United States Government, for the purpose of a navigable chan-

nel under the various acts of Congress affecting the North Branch of the Chicago River is of the value of $7,547.00."

And presented a request in writing in said words and figures, but the court refused to make said requested finding of fact, and marked the same in writing "Refused." To the ruling of the court in refusing to make said requested finding of fact, and to the marking of said written request "Refused" and each thereof, the petitioner, by his counsel then and there duly excepted.

And thereupon the petitioner requested the court to make the following finding of fact, viz:

"2. The court finds the damages of *of* the petitioner herein to be $7,547.00."

And presented a request in writing in said words and figures, but the court refused to make said requested finding of fact, and marked the same in writing "Refused." To the ruling of the court in refusing to find said requested finding of fact, and to the marking of said written request "Refused" and each thereof, the petitioner, by his counsel, then and there duly excepted.

And thereupon the petitioner requested the court to make the following conclusions of law herein, viz:

"1. That the United States Government has taken for public use the property of the petitioner of the value of $7,547.00, without first making just compensation to him therefor."

And presented a request in writing in said words and figures,
which the court marked "Refused." To the ruling of the
34 court in refusing to make said conclusion of law, and to the
marking of the same "Refused" and each thereof, the petitioner, by his counsel then and there duly excepted.

"2. That the United States Government, by taking the property of the petitioner for public use, without first making just compensation to him therefor, by virtue of the Fifth Amendment of the Constitution of the United States entered into an implied contract to pay the petitioner for the value thereof whenever the petitioner approved of and accepted of the taking."

And presented a request in writing in said words and figures, which the court marked "Refused." To the ruling of the court in refusing to make said conclusion of law, and to the marking of the same "Refused" and each thereof, the petitioner, by his counsel, then and there duly excepted.

"3. That the petitioner did not lose his right to compensation for the taking of his property by the Government without compensation until twenty (20) years had elapsed from the time of the taking."

And presented a request in writing in said words and figures, which the court marked "Refused." To the ruling of the court in refusing to make said conclusion of law, and to the marking of the same "Refused" and each thereof, the petitioner, by his counsel, then and there duly excepted.

"4. That the right of the petitioner to file his suit accrued within six (6) years from the time the same commenced." And presented

a request in writing in said words and figures, which the court marked "Refused." To the ruling of the court in refusing to make said conclusion of law, and to the marking of the same "Refused" and each thereof, the petitioner, by his counsel, then and there duly excepted.

35 "5. That the petitioner is entitled to a finding of his damages against the United States for the sum of $7,547.00 and to judgment thereon."

And presented a request in writing in said words and figures, which the court marked "Refused." To the ruling of the court in refusing to make said conclusion of law, and to the marking of the same "Refused" and each thereof, the petitioner, by his counsel, then and there duly excepted.

And thereupon the respondent requested the court to adopt the following conclusions of law herein, viz:

"I. The North Branch of the Chicago River in its natural state was a navigable stream."

And thereupon presented a conclusion of law in said words and figures, to which the petitioner, by his counsel, then and there duly objected, but the court overruled the objection of said petitioner, and then and there made said finding of law and marked the written finding so presented "Found." To the ruling of the court in making said conclusion of law and marking the request so presented "Found" and each thereof, the petitioner, by his counsel, then and there duly excepted.

"II. The North Branch of the Chicago River, between Western Avenue and Belmont Avenue, was navigable in fact as early as 1889."

And thereupon presented a conclusion of law in said words and figures, to which the petitioner, by his counsel, then and there duly objected, but the court overruled the objection of said petitioner, and then and there made said finding of law and marked the written finding so presented "Found." To the ruling of the court in making said conclusion of law and marking the request so presented "Found" and each thereof, the petitioner, by his counsel, then and there duly excepted.

36 "III. No claim for land taken as a result of the dredging by the United States Government in 1899 can be heard in this suit for the reason that this being a petition under the Tucker Act the six year limitation of that Act is a jurisdictional requirement, and accordingly no claim arising prior to 1905 can be here considered."

And thereupon presented a conclusion of law in said words and figures, to which the petitioner, by his counsel, then and there duly objected, but the court overruled the objection of said petitioner, and then and there made said finding of law and marked the written finding so presented "Found." To the ruling of the court in making said conclusion of law and marking the request so presented "Found" and each thereof, the petitioner, by his counsel, then and there duly excepted.

"IV. No land belonging to Franz Tempel was taken by the

United States Government as a result of the dredging of 1899 within the meaning of the Fifth Amendment to the Constitution of the United States."

And thereupon presented a conclusion of law in said words and figures, to which the petitioner, by his counsel, then and there duly objected, but the court overruled the objection of said petitioner, and then and there made said finding of law and marked the written finding so presented "Found." To the ruling of the court in making said conclusion of law and marking the request so presented "Found" and each thereof, the petitioner, by his counsel, then and there duly excepted.

"V. No land belonging to Franz Tempel was taken by the United States Government as a result of the dredging of 1909 within the meaning of the Fifth Amendment to the Constitution of the United States."

37 And thereupon presented a conclusion of law in said words and figures, to which the petitioner, by his counsel, then and there duly objected, but the court overruled the objection of said petitioner, and then and there made said finding of law and marked the written finding so presented "Found." To the ruling of the court in making said conclusion of law and marking the request so presented "Found" and each thereof, the petitioner, by his counsel, then and there duly excepted.

"VI. The petitioner herein having failed to complain of the use by the public of the stream in front of his property as a river navigable in fact for a period of at least ten years prior to the first dredging by the United States Government in 1899 is estopped from thereafter disputing the navigability of said river."

And thereupon presented a conclusion of law in said words and figures, to which the petitioner, by his counsel, then and there duly objected, but the court overruled the objection of said petitioner, and then and there made said finding of law and marked the written finding so presented "Found." To the ruling of the court in making said conclusion of law and marking the request so presented "Found" and each thereof, the petitioner, by his counsel, then and there duly excepted.

"VII. The title to the bed of the North Branch of the Chicago River in front of Tempel's property, whether in the State of Illinois or Franz Tempel, was subject to an easement in favor of the United States Government, and that any damages, caused by the dredging of said bed, to the bank along the shore line of said Tempel's property are only incidental and consequential, for which the United States Government is not answerable in damages."

38 And thereupon presented a conclusion of law in said words and figures, to which the petitioner, by his counsel, then and there duly objected, but the court overruled the objection of said petitioner, and then and there made said finding of law and marked the written findings so presented "Found." To the ruling of the court in making said conclusion of law and marking the request so presented "Found" and each thereof, the petitioner, by his counsel, then and there duly excepted.

"VIII. Said Tempel as a riparian owner along a navigable stream must himself bear the loss of any wearing away of his bank by erosion."

And thereupon presented a conclusion of law in said words and figures, to which the petitioner, by his counsel, then and there duly objected, but the court overruled the objection of said petitioner, and then and there made said finding of law and marked the written finding so presented "Found." To the ruling of the court in making said conclusion of law and marking the request so presented "found"and each thereof, the petitioner, by his counsel then and there duly excepted.

"IX. The North Branch of the Chicago River in front of Tempel's property being a navigable stream the dredging of the bottom of the river bed by the United States Government in 1899 did not constitute a taking within the meaning of the Fifth Amendment to the Constitution of the United States."

And thereupon presented a conclusion of law in said words and figures, to which the petitioner, by his counsel, then and there duly objected, but the court overruled the objection of said petitioner, and then and there made said finding of law and marked the written finding so presented "Found." To the ruling of the court in making said conclusion of law and marking the request so
39 presented "Found" and each thereof, the petitioner, by his counsel, then and there duly excepted.

"X. The North Branch of the Chicago River in front of Tempel's property being a navigable stream the dredging of the bottom of the river bed by the United States Government in 1909 did not constitute a taking within the meaning of the Fifth Amendment to the Constitution of the United States."

And thereupon presented a conclusion of law in said words and figures, to which the petitioner, by his counsel, then and there duly objected, but the court overruled the objection of said petitioner, and then and there made said finding of law and marked the written finding so presented "Found." To the ruling of the court in making said conclusion of law and marking the request so presented "Found" and each thereof, the petitioner, by his counsel, then and there duly excepted.

And the petitioner then and there moved the court for a rehearing herein, which motion was denied by the court. To the ruling of said court in denying said motion for a re-hearing, said petitioner then and there duly excepted, and the court then and there, on motion of the respondent, over the objection of the petitioner, rendered judgment herein against the petitioner for costs. To the said ruling of the Court in rendering judgment against the petitioner herein, the petitioner, by his counsel then and there duly excepted.

Forasmuch, therefore, as the matters and things above set forth do not fully appear of record, the petitioner, Franz Tempel, tenders this, his bill of exceptions, and prays that the same be signed and sealed by the judge of this court, pursuant to the statute in such case made and provided, which is done accordingly this 25th day of August, A. D. 1914.

GEORGE A. CARPENTER, *Judge.* [SEAL.]

(Endorsed:) Filed Sept. 25, 1914. T. C. MacMillan, Clerk.

40 And afterwards to-wit: on the twenty-ninth day of May, 1916, came the petitioner in said entitled cause by his attorney and filed in the clerk's office of said Court, his certain Petition for Writ of Error in words and figures following to-wit:

41 *Petition for Writ of Error.*

UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division, ss:

In the United States District Court.

No. 30363.

FRANZ TEMPEL
vs.
UNITED STATES.

Petition for Writ of Error.

To the Honorable Judges of said Court:

Your petitioner, Franz Tempel, respectfully shows to your Honors:

1. That on or about the 2nd day of June, 1914, the District Court of the United States entered a judgment herein in favor of the respondent and against the petitioner, in which judgment and the proceedings had prior thereto in this court certain errors were committed, all of which will more in detail appear from the assignment of the errors, which is herewith filed.

2. That said proceedings involved the application of the Constitution of the United States, or an amendment thereof.

Wherefore, this petitioner prays that a writ of error may issue in this behalf out of the Supreme Court of the United States, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

THOS. B. LANTRY,
Attorney for Petitioner.

(Endorsed:) Filed May 29, 1916. T. C. MacMillan, Clerk.

42 And on the same day to-wit: the twenty-ninth day of May, 1916, came the petitioner in said entitled cause by his attorney and filed in the clerk's office of said Court his certain Assignment of Errors in words and figures following to-wit:

43 *Assignment of Errors.*

UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division, ss:

In the United States District Court.

No. 30363.

FRANZ TEMPEL
vs.
UNITED STATES.

Assignment of Errors.

Now comes the petitioner, Franz Tempel, and assigns the errors in the decision of said court as follows:

1. The said court erred in rendering judgment for the respondent with costs against the petitioner.
2. The said court erred in refusing to making the findings of fact requested by the petitioner, and each thereof.
3. The said court erred in refusing to make the conclusions of law and each thereof requested by the petitioner.
4. The court erred in refusing to make the first finding of fact of the refused findings of fact submitted by the petitioner, viz:

"1. That the value of the artifically submerged land taken by the United States Government for the purpose of a navigable channel under the various acts of Congress affecting the North Branch of the Chicago River is of the value of $7,547.00,"

and in marking the same "refused."
5. The said court erred in refusing to make the second finding of fact of the petitioner's findings of fact, viz:

"2. The court finds the damages of the petitioner herein to be $7,547.00,"

44 and in marking the same "refused."
6. The court erred in refusing to make the first conclusion of law of the refused conclusions of law of petitioner, viz:

"1. That the United States Government has taken for public use the property of the petitioner of the value of $7,547.00, without first making just compensation to him therefor,"

and in marking the same "refused."
7. The court erred in refusing to make the second conclusion of law of the refused conclusions of law of petitioner, viz:

"2. That the United States Government, by taking the property of the petitioner for public use, without first making just compen-

sation to him therefor, by virtue of the Fifth Amendment of the Constitution of the United States entered into an implied contract to pay the petitioner for the value thereof whenever the petitioner approved of and accepted of the taking,"

and in marking the same "refused."

8. The court erred in refusing to make the third conclusion of law of the refused conclusions of law of petitioner, viz:

"3. That the petitioner did not lose his right to compensation for the taking of his property by the Government without compensation until twenty (20) years had elapsed from the time of the taking,"

and in marking the same "refused."

9. The court erred in refusing to make the fourth conclusion of law of the refused conclusions of law of petitioner, viz:

45 "4. That the right of the petitioner to file his suit accrued within six (6) years from the time the same commenced,"

and in marking the same "refused."

10. The court erred in refusing to make the fifth conclusion of law of the refused conclusions of law of petitioner, viz:

"5. That the petitioner is entitled to a finding of his damages against the United States for the sum of $7,547.00 and to judgment thereon,"

and in marking the same "refused."

11. The court erred in adopting the first conclusion of law requested by the respondent, viz:

"I. The North Branch of the Chicago River in its natural state was a navigable stream,"

and in marking the same "found."

12. The court erred in adopting the second conclusion of law requested by the respondent, viz:

"II. The North Branch of the Chicago River, between Western Avenue and Belmont Avenue, was navigable in fact as early as 1889,"

and in marking the same "found."

13. The court erred in adopting the third conclusion of law requested by the respondent, viz:

"III. No claim for land taken as a result of the dredging by the United States Government in 1899 can be heard in this suit for the reason that this being a petition under the Tucker Act the
46 six year limitation of that Act is a jurisdictional requirement, and accordingly no claim arising prior to 1905 can be here considered,"

and in marking the same "found."

14. The court erred in adopting the fourth conclusion of law requested by the respondent, viz:

"IV. No land belonging to Franz Tempel was taken by the United

States Government as a result of the dredging of 1899 within the meaning of the Fifth Amendment to the Constitution of the United States,"

and in marking the same "found."

15. The court erred in adopting the fifth conclusion of law requested by the respondent, viz:

"V. No land belonging to Franz Tempel was taken by the United States Government as a result of the dredging of 1909 within the meaning of the Fifth Amendment to the Constitution of the United States,"

and in marking the same "found."

16. The court erred in adopting the sixth conclusion of law requested by the respondent, viz:

"VI. The petitioner herein having failed to complain of the use by the public of the stream in front of his property as a river navigable in fact for a period of at least ten years prior to the first dredging by the United States Government in 1899 is estopped from thereafter disputing the navigability of said river,"

and in marking the same "found."

47 17. The court erred in adopting the seventh conclusion of law requested by the respondent, viz:

"VII. The title to the bed of the North Branch of the Chicago River in front of Tempel's property, whether in the State of Illinois or Franz Tempel, was subject to an easement in favor of the United States Government, and that any damages caused by the dredging of said bed, to the bank along the shore line of said Tempel, are only incidental and consequential, for which the United States Government is not answerable in damages,"

and in marking the same "found."

18. The court erred in adopting the eighth conclusion of law requested by the respondent, viz:

"VIII. Said Tempel as a riparian owner along a navigable stream must himself bear the loss of any wearing away of his bank by erosion,"

and in marking the same "found."

19. The court erred in adopting the ninth conclusion of law requested by the respondent, viz:

"IX. The North Branch of the Chicago River in front of Tempel's property being a navigable stream the dredging of the bottom of the river bed by the United States Government in 1899 did not constitute a taking within the meaning of the Fifth Amendment to the Constitution of the United States,"

and in marking the same "found."

48 20. The court erred in adopting the tenth conclusion of law requested by the respondent, viz:

"X. The North Branch of the Chicago River in front of Tempel's

property being a navigable stream the dredging of the bottom of the river bed by the United States Government in 1909 did not constitute a taking within the meaning of the Fifth Amendment to the Constitution of the United States,"

and in marking the same "found."

21. The court erred in entering judgment against the petitioner for costs.

22. That the court erred in not entering judgment against the respondent in favor of the petitioner for the sum of Seventy-five Hundred Forty-seven ($7,547.00) Dollars.

Wherefore, your petitioner prays that the judgment of the District Court of the United States, Northern District of Illinois, Eastern Division, be reversed, and that said cause be remanded, either directing said District Court to enter judgment in favor of the petitioner and against the respondent, in the sum of Seventy-five Hundred Forty-seven ($7,547.00) Dollars, or for a new trial.

THOS. B. LANTRY,
Attorney for Petitioner.

(Endorsed:) Filed May 29, 1916. T. C. MacMillan, Clerk.

49 And on the same day to-wit: the twenty ninth day of May, 1916, in the record of proceedings thereof in said entitled cause before the Hon. George A. Carpenter, Judge of said Court, appears the following entry to-wit:

50 UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division, ss:

In the United States District Court.

No. 30363.

FRANZ TEMPEL
vs.
UNITED STATES.

This day comes the petitioner, by his attorney, and files herein and presents to the court his petition praying for the allowance of a writ of error and an assignment of errors intended to be urged by him, and praying also that a transcript of the record and proceedings upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other proceedings be had as are proper in the premises, and said petitioner having also filed a bond in the penal sum of Two Hundred Fifty ($250.00) Dollars, heretofore provided, in consideration of which the court doth allow a writ of error, and order that the same stand as a supersedeas.

Enter:

CARPENTER, *Judge.*

29th May, 1916.

51 And on the same day to-wit: the twenty-ninth day of May, 1916, there was filed in the clerk's office of said Court in said entitled cause a certain Bond in words and figures following to-wit:

Bond.

Know all men by these presents, that we, Franz Tempel, as principal and Barbara Tempel as sureties, are held and firmly bound unto United States of America in the full and just sum of two hundred fifty — to be paid to the said United States of America, certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 29th day of May, in the year of our Lord one thousand nine hundred and sixteen.

Whereas, lately *at a judgment* in a suit depending in said Court between Franz Tempel, as petitioner and the United States of America, as respondent, a judgment was rendered against the said Franz Tempel and the said Franz Tempel having obtained a writ of error, and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington within — days from the date thereof.

Now, the condition of the above obligation is such, That if the said Franz Tempel shall prosecute his — to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

FRANZ TEMPEL. [SEAL.]
BARBARA TEMPEL. [SEAL.]

Approved by
CARPENTER, *Judge.*

29 May, 1916.

(Endorsed:) Filed May 29, 1916. T. C. MacMillan, Clerk.

52 And on the same day to-wit: the twenty ninth day of May, 1916, there was filed in the clerk's office of said court in said entitled cause a certain Stipulation Reducing Record. Said Stipulation is in the words and figures following to-wit:

Stipulation Reducing Record.

UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division, ss:

In the United States District Court.

No. 30363.

FRANZ TEMPEL
vs.
UNITED STATES.

Stipulation Reducing Record.

It is hereby stipulated by the solicitors for the parties hereto that in making up the transcript of record on the writ of error in the above entitled cause, the clerk may include only the following papers and records, to-wit:

1. Petition of petitioner and map attached to same, filed April 17, 1911.
2. Appearance of petitioner, filed April 17, 1911.
3. Appearance of respondent, filed May 31, 1911.
4. Answer of respondent, filed November 3, 1911.
5. Replication of petitioner, filed March 22, 1912.
6. Findings of fact, filed June 2, 1914.
7. Conclusions of law, filed June 2, 1914.
8. Refused findings of fact filed by petitioner, filed June 2, 1914.
9. Refused conclusions of law filed by petitioner, filed June 2, 1914.
10. Final order upon findings entered June 2, 1914.
11. Order of June 2, 1914, fixing time for bill of exceptions and bond.
12. Order extending time to file bill of exceptions, entered July 16, 1914.
13. Bill of exceptions, filed September 25, 1914.
14. Stipulation reducing record, filed the 29th day of May, 1916.

53 15. Præcipe for record, filed May 29th, 1916.

16. Petition for writ of error, filed the — day of May, 1916.
17. Writ of error issued May 29th, 1916.
18. Citation and proof of service thereon.
19. Bond filed May 29th, 1916.
20. Assignment of errors.

and that an order may be entered accordingly, if the court shall deem the same proper.

THOS. B. LANTRY,
Attorney for Petitioner.
CHARLES F. CLYNE,
Attorney for Respondent.

(Endorsed:) Filed May 29, 1916. T. C. MacMillan, Clerk.

54 *Præcipe for Transcript of Record.*

UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division, ss:

In the United States District Court.

No. 30363.

FRANZ TEMPEL
vs.
UNITED STATES.

To the Clerk of said Court:

You are requested to make a transcript of record to be filed in the United States Supreme Court, pursuant to a writ of error allowed in the above entitled cause, and include in such transcript of record the following, and no other papers or exhibits, viz:

1. Petition of petitioner and map attached to same, filed April 17, 1911.
2. Appearance of petitioner, filed April 17, 1911.
3. Appearance of respondent, filed May 31, 1911.
4. Answer of respondent, filed November 3, 1911.
5. Replication of petitioner, filed March 22, 1912.
6. Findings of fact, filed June 2, 1914.
7. Conclusions of law, filed June 2, 1914.
8. Refused findings of fact filed by petitioner, filed June 2, 1914.
9. Refused conclusions of law filed by petitioner, filed June 2, 1914.
10. Final order upon findings entered June 2, 1914.
11. Order of June 2, 1914, fixing time for bill of exceptions and bond.
12. Order extending time to file bill of exceptions, entered July 16, 1914.
13. Bill of exceptions, filed September 25, 1914.
14. Stipulation reducing record, filed the 29th day of May, 1916.

55 15. Præcipe for record, filed May 29th, 1916.

16. Petition for writ of error, filed the 29th day of May, 1916.
17. Writ of error issued May 29 1916.
17*a*. Order granting writ of error.
18. Citation and proof of service thereon.
19. Bond filed May 29 1916.
20. Assignment of errors.

THOMAS B. LANTRY,
Attorney for Petitioner.

(Endorsed:) Filed May 29, 1916. T. C. MacMillan, Clerk.

56 NORTHERN DISTRICT OF ILLINOIS,
Eastern Division, ss:

I, T. C. MacMillan, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and aforegoing to be a true and complete transcript of the proceedings had of record, made in accordance with Præcipe filed in this Court, in the cause entitled Franz Tempel, vs. United States, as the same appear from the original Records and Files thereof, now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office, in the City of Chicago, in said District, this fifth day of June, 1916.

[Seal of Dist. Court U. S., Northern Dist. Illinois, 1855.]

T. C. MACMILLAN, *Clerk.*

57 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the District Court of the United States for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between Franz Tempel, Petitioner, and United States, Defendant, a manifest error hath happened, to the great damage of the said Franz Tempel, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-ninth day of May, in the year of our Lord one thousand nine hundred and sixteen.

[Seal of Dist. Court U. S., Northern Dist. Illinois, 1855.]

T. C. MACMILLAN,
Clerk of the District Court of the United States
for the Northern Dist. of Illinois.

Allowed by
HON. GEORGE A. CARPENTER, *Judge.*

[Endorsed:] 30363. Supreme Court of the United States. Franz Tempel vs. United States. Writ of Error. Filed May 29, 1916. T. C. MacMillan, Clerk. Copy deposited for the defendant in error in the Clerk's Office, U. S. District Court, Northern District of Illinois.

58 UNITED STATES OF AMERICA, *ss:*

To United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the District Court of the United States of the Northern District of Illinois, Eastern Division, wherein Franz Tempel is plaintiff in error and the United States of America is defendant in error, *and you are* to show cause, if any there be, why the Judgment rendered against the said plaintiff in error as in the said *defendant in* error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States this 29th day of May, in the year of our Lord one thousand nine hundred sixteen.

GEORGE A. CARPENTER, *Judge.*

Due service is hereby accepted of the above citation this 29th day of May, A. D. 1916.

CHARLES F. CLYNE,
United States Attorney.

59 [Endorsed:] No. 30363. Supreme Court of the United States. —— —— vs. —— ——. Citation to the Supreme Court of the United States. Filed May 31, 1916, at — o'clock — M. T. C. MacMillan, Clerk.

60 In the Supreme Court of the United States, October Term, 1916.

No. —.

FRANZ TEMPEL, Plaintiff in Error,
vs.
THE UNITED STATES.

Stipulation as to Printing of Record.

It is hereby stipulated by and between counsel for the parties to the above-entitled cause that in the printing of the transcript of

the record therein the maps appearing on pages eight (8) and twenty-one (21), respectively, may be omitted by the clerk.

TIMOTHY F. MULLEN,
Counsel for Plaintiff in Error.
JNO. W. DAVIS,
Solicitor General.

June 20, 1916.

[Endorsed:] 536-16/25366.

61 [Endorsed:] File No. 25,366. Supreme Court U. S., October term, 1915. Term No. 536. Franz Tempel, Pl'ff in Error, vs. The United States. Stipulation as to printing record. Filed July 5, 1916.

Endorsed on cover: File No. 25,366. N. Illinois D. C. U. S. Term No. 536. Franz Tempel, plaintiff in error, vs. The United States Filed June 27th, 1916. File No. 25,366.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

FRANZ TEMPEL, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 536.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION BY THE UNITED STATES TO PLACE ON THE SUMMARY DOCKET.

Comes now the Solicitor General and respectfully moves the court to place the above-entitled cause on the summary docket.

STATEMENT.

Under the provisions of the Tucker Act, 24 Stat. 505, Tempel brought suit against the United States in the District Court for damages occasioned by the alleged taking of a certain part of his property in the improvement of the North Branch of the Chicago River without payment of just compensation, in violation of the Fifth Amendment.

THE FACTS.

Tempel was the owner of certain property situated along the North Branch of the Chicago River. After becoming the owner of the property he leased it to another for a brickyard. By the terms of the lease the lessee was permitted to dredge the river in front of the land for the purpose of making brick from the clay contained therein. The lease covenanted that the lessee in his dredging operations should not disturb Tempel's upland. Without knowledge or consent of Tempel, the lessee permitted the dredging away of Tempel's upland, the result of which was to cause the water to become diverted and to flow over that portion which had been dredged away, thereby widening the river in front of Tempel's land.

Subsequently, Congress provided for the improvement of the North Branch of the Chicago River. Pursuant to this authority the Government deepened the channel in front of Tempel's land and located the same upon the submerged land of Tempel where it had been dredged away by Tempel's lessee.

In the lower court Tempel insisted that the foregoing facts constituted a "taking" by the Government of his property for public use, and the Government thereby became, under an implied contract, liable to pay for the value thereof. The lower court held *inter alia* (*a*) that the North Branch of the Chicago River in its natural state was a navigable stream, and (*b*) that the dredging of the bottom of the river by the Government did not constitute a "taking" within the meaning of the Fifth Amendment.

An appeal directly to this court was allowed because of the alleged constitutional question.

It is submitted that the Chicago River has always been considered a navigable river in its "natural" state (see *Escanaba Co.* v. *Chicago*, 107 U. S. 678, 683); that the case is one short in compass; that the principal questions are substantially foreclosed by prior decisions of this court (see *United States* v. *W. R. Cress &c.*, Nos. 84 and 718, October Term, 1916, decided Mar. 12, 1917), and therefore will not require extended argument; and that the case should be placed on the summary docket.

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,
Solicitor General.

APRIL, 1917.

○

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1916.

No. 29

FRANZ TEMPEL,
Plaintiff in Error.

vs.

UNITED STATES,
Defendant in Error.

In Error to the District Court of the United States, for the Northern District of Illinois.

Brief and Argument for Plaintiff in Error.

TIMOTHY F. MULLEN,
Attorney for Plaintiff in Error.

THOMAS B. LANTRY,
Of Counsel.

CHAMPLIN LAW PRINTING CO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1916.

No. 536

FRANZ TEMPEL,
Plaintiff in Error.

vs.

UNITED STATES,
Defendant in Error.

In Error to the District Court of the United States, for the Northern District of Illinois.

Brief and Argument for Plaintiff in Error.

STATEMENT OF THE CASE.

By this writ of error we ask this court to review the judgment of the District Court of the United States, for the Northern District of Illinois, which rendered judgment for the United States and against the plaintiff in error upon certain findings of fact found by the District judge upon the hearing of a claim filed by the plaintiff in error in the United States Circuit Court before the passage of "The Judicial Code."

The claim of the plaintiff in error was for his damages for the taking of his property in improving the North Branch of the Chicago river in the City of Chicago, Illinois, south of the street known as Belmont avenue.

The petition was filed April 7, 1911, and alleges all the jurisdictional facts required by the then existing statute. The answer puts the plaintiff in error upon proof of substantially all the allegations in said petition, but admits that the petitioner received no compensation from the United States for any land alleged to have been taken from him by the United States for the purpose of navigation, and admits that it had never acquired title to the land alleged in said petition to have been wrongfully taken by the United States from said petitioner, either by purchase or condemnation, and that it has never tendered the petitioner any sum of money, or the equivalent of the value of said land, because it contends that it never at any time had taken or acquired any of the land mentioned in said petition.

A replication was filed to said answer to conform with the practice in Illinois.

By the findings of fact (Trans. of Rec. 8-11) it appears:

1. That the petitioner purchased and is the owner of certain lots therein described, lying along the northeast bank of the Chicago river, some distance south of Belmont avenue, the north line of section 25, township 40 north, range 13, east of the third principal meridian.

2. That the North Branch of the Chicago river was originally surveyed by the Government in 1837, and was about 150 feet wide, where it crossed the east side of section 25, and meandered west and then north, crossing Belmont avenue, the north line of said section, where it was about 50 feet wide, and in its natural state the said North Branch was a small surface stream, which in the spring time would accommodate the floating of logs, or the travel by canoes or rowboats, and in the summer time there was very little water whatsoever.

3. That prior to 1889, the time of the purchase by the plaintiff in error of his property, a channel had been dug by the riparian owners in the North Branch so surveyed, and schooners had navigated the same about half a mile north of said Belmont avenue, and a dock had been erected south of plaintiff in error's property, and at that time the stream had been dredged to accommodate boats of eight or nine feet breadth.

4. That the plaintiff in error, some time after its purchase, had leased his land to one Zappel for a brick-yard, and by the terms of the lease said Zappel was privileged to dredge the bottom of the river in front of these premises, but covenanted and was ordered not to interfere with the upland. He also covenanted to yield up the premises in the same condition as they were when demised, but said Zappel, without the consent or knowledge of the plaintiff in error, had a dredging company at divers times during a period of five years of his term dig away and through the upland of the plaintiff in error to the depth of 14 feet, so that it took

away in some places 60 feet in width of the plaintiff in error's property, to the depth of from six to fourteen feet, and as a result the water flowed over that portion so dug away, all of which was without the knowledge or consent of the plaintiff in error.

5. That while plaintiff in error's property was in this condition, the United States Government passed an act to improve the North Branch of the Chicago river, as far north as Belmont avenue, by dredging the same to admit the passage of vessels of a draft of sixteen feet, and afterwards, in 1899, provided for a survey and the estimate of the cost of a channel of 21 feet in lieu of the depth fixed by the Act of 1896.

6. That the United States Government in 1899 dredged a channel to the depth of 17 feet, some 30 feet in width, as far north as Belmont avenue, and subsequently in 1909 redredged the same to the depth of 21 feet, and to a width of 60 feet, under divers appropriations made by congress for such purpose between 1898 and 1909.

7. That in digging said channel the said United States Government surveyed and located the same, not in the natural channel of the river, but upon the submerged land of plaintiff in error, where the same had been dredged by this dredging company on behalf of plaintiff in error's tenant, contrary to his covenant, and without the consent or knowledge of the plaintiff in error.

8. That the plaintiff in error knew nothing about the dredging nor the locating of the channel upon his property until some time in February, 1910;

that he immediately made a demand upon the United States Government for the possession of his property, which was refused.

9. That no compensation had been made to the petitioner by the United States Government, or by any one for it at any time for his land taken as aforesaid.

10. That by reason of the changes in said river as aforesaid the value of the premises of the petitioner when he purchased the same—that is, before the taking, and the value of the same at the time the demand was made, less the cost to him of reclaiming the same, if he were entitled to make reclamation thereof, was seventy-five hundred forty-seven ($7,547) dollars.

11. That the plaintiff in error filed his petition herein under the so-called Tucker Act, April 6, 1911, praying for the damages to him for the land taken by the Government as aforesaid.

Upon these findings of fact the court held the following conclusions of law (Trans. of Rec. 12-13), which were duly excepted to by the plainitff in error, as will appear by the bill of exceptions (Trans. of Rec. 15-20):

I. That the North Branch of the Chicago river in its natural state was a navigable stream.

II. That it was navigable in fact between Western avenue and Belmont avenue as early as 1889.

III. No claim for land taken as a result of the dredging by the United States Government in 1899 can be heard in this suit, for the reason that this

being a petition under the so-called Tucker Act. the six-year limitation of that Act is a jurisdictional requirement, and accordingly no claim arising prior to 1905 can be here considered.

IV. No land belonging to Franz Temple was taken by the United States Government as a result of the dredging of 1909, within the meaning to the Fifth Amendment to the Constitution of the United States.

V. That no land belonging to Franz Temple was taken by the United States Government as a result of the dredging of 1909, within the meaning of the Fifth Amendment to the Constitution of the United States.

VI. That the petitioner herein, having failed to complain of the use by the public of the stream in front of his property as a river navigable in fact, for a period of at least ten years prior to the first dredging by the United States Government in 1889, is estopped from thereafter disputing the navigability of said river.

VII. That the title to the bed of the North Branch of the Chicago river in front of Temple's property, whether in the State of Illinois, or Franz Temple, was subject to an easement in favor of the United States Government, and that any damages caused by the dredging of the said bed are only incidental and consequential, for which the United States Government is not answerable in damages.

IX. That the North Branch of the Chicago river in front of Temple's property being a navigable stream, the dredging of the bottom of the river

bed by the United States Government in 1899, did not constitute a taking within the meaning of the Fifth Amendment to the Constitution.

X. That the North Branch of the river in front of Temple's property being a navigable stream, the dredging by the United States Government in 1909, did not constitute a taking within the meaning of the Fifth Amendment to the Constitution of the United States.

The plainiff in error presented the following conclusions of law, which were refused by the court (Trans. of Rec. 14):

1. That the United States Government has taken for public use the property of the petitioner of the value of seventy-five hundred forty-seven ($7,547) dollars, without first making just compensation to him therefor.

2. That the United States Government, by taking the property of the petitioner for public use, without first making just compensation to him therefor, by virtue of the Fifth Amendment to the Constitution of the United States entered into an implied contract to pay the petitioner for the value thereof, whenever the petitioner approved of and accepted of the taking.

3. That the petitioner did not lose his right to compensation for the taking of his property by the Government, without compensation, until 20 years had elapsed from the time of the taking of the same.

4. That the right of the petitioner to file his suit accrued within six years from the time the same commenced.

5. That the petitioner is entitled to a finding of his damages against the United States for the sum of seventy-five hundred forty-seven ($7,547) dollars, and judgment thereon.

Exceptions were duly taken by the plaintiff in error to each of these rulings of the court, and also to the judgment of the court in denying his motion for a rehearing and rendering judgment against the plaintiff in error for costs, which exceptions appear in the bill of exceptions (Trans. of Rec. 15-20).

The plaintiff in error also presented two other requests to find, which are called findings of fact, but which are in reality conclusions of law which were refused by the court, and duly excepted to the same, and had incorporated in the bill of exceptions all the evidence offered or adduced by either party upon the subject-matter covered thereby, which evidence will be found in transcript of record 16, and the exceptions will be found in transcript of record 17.

These requests to find were as follows:

1. That the value of the artificially submerged land taken by the United States Government for the purpose of a navigable channel under the various Acts of congress affecting the North Branch of the Chicago river is of the value of seventy-five hundred forty-seven ($7,547) dollars.

2. The court finds the damages of the petitioner to be seventy-five hundred forty-seven ($7,547) dollars.

These conclusions of law held by the court at the request of the Government, and these refused requests presented by the plaintiff in error involve substantially the same errors, and are made the basis of our assignment of errors (Trans. of Rec. 22-25) and we hereby summarize the errors relied upon as follows:

1. That the court erred in refusing to hold that the United States Government had taken for public use the property of the plaintiff in error of the value of seventy-five hundred forty-seven ($7,547) dollars, without first making just compensation to him therefor.

2. That the court erred in refusing to hold that the United States Government had taken the property of the petitioner for public use without first making just compensation to him therefor, by virtue of the Fifth Amendment to the Constitution of the United States, and thereby entered into an implied contract to pay the plaintiff in error for the value thereof whenever the plaintiff in error approved of and accepted of the taking.

3. That the court erred in refusing to hold that the petitioner did not lose his right to compensation for the taking of his property by the Government without compensation, until 20 years had elapsed from the time of the taking.

4. That the court erred in not holding that the right of the petitioner to file his suit accrued within six years from the time the same commenced.

5. That the court erred in refusing to hold that the petitioner is entitled to a finding of his damages

against the United States for the sum of seventy-five hundred forty-seven ($7,547) dollars and to judgment thereon.

6. That the court erred in refusing to hold that the value of the artificially submerged land taken by the United States Government for the purpose of a navigable channel, under the various Acts of congress affecting the North Branch of the Chicago river, is of the value of seventy-five hundred forty-seven ($7,547) dollars.

7. That the court erred in refusing to find that the damages of the petitioner herein be the sum of seventy-five hundred forty-seven ($7,547) dollars.

8. That the court erred in rendering judgment for the Government and against the petitioner for costs.

9. That the court erred in not rendering judgment against the Government in favor of the plaintiff in error for the sum of seventy-five hundred forty-seven ($7,547) dollars.

BRIEF.

A riparian owner upon a stream may maintain his bank upon the stream in its original condition, or restore it to that condition.

Philadelphia Co. v. *Stimpson*, 223 U. S. 605, 624, 626.

Gulf C. & S. F. Ry. Co. v. *Clark*, 101 Fed. Rep. 678, 680.

Fowler v. *Wood*, 73 Kas. 511; 85 Pac. 763; 117 Am. St. Rep. 534.

Farnham on Waters, Sec. 530, page 1725.

City of Chicago v. *Ward*, 169 Ill. 392, 406.

Mulry v. *Norton*, 100 N. Y. 424, 3 N. E. 581.

City of St. Louis v. *Rutz*, 138 U. S. 226.

Schultz v. *Warner*, 218 Ill. 108, 118.

Prescription seems to be the test of determining whether a riparian owner loses his right to compensation for land taken.

Faulk v. *Mo. River & N. W. Ry. Co.*, 28 S. Dakota 1, 132 N. W. 233.

Fries v. *Wheeling & L. E. Ry. Co.*, 56 Ohio St. 135, 46 N. E. 516.

Syracuse Solar Salt Co. v. *Rome, W. & O. Ry. Co.*, 22 N. Y. Supp. 321.

The public has no proprietorship in soil under small streams which are navigable only in a modified sense, for the floatage of logs and lumber, as

it has under navigable waters at common law, where the tide ebbs and flows.

Attorney-General v. *Everett Booming Co.*, 34 Mich. 462.

Lawrence R. Co. v. *O'Hara*, 48 Ohio St. 343, 28 N. E. 175.

People v. *Economy Power Co.*, 241 Ill. 290.

The statute of limitations in any event does not run against the land owner for the taking of his land in condemnation proceedings until the work has been completed.

Brower v. *City of Philadelphia*, 8 Pa. Co. Ct. Rep. 361.

Land is not taken under the meaning of the fifth amendment to the constitution, until compensation is paid, and the title passes from the owner, and the act of the petitioner filing his petition for compensation is an acceptance of the taking, and his right of action accrues upon such acceptance.

Great Falls Mfg. Co. v. *Garland*, 124 U. S. 581.

Fries v. *Wheeling*, 56 Ohio. St. 135, 46 N. E. 516.

Kennedy v. *Indianapolis*, 103 U. S. 599.

The right of the public to improve the navigability of a stream without compensation is confined to the natural bed of the stream.

Improvement Co. v. *Sassaman*, 67 Pa. 415.

Weaver v. *Miss. & Rum River Boom Co.*, 28 Minn. 534, 11 N. W. 114.

Brown v. *United States*, 81 Fed. 55.

The commencement of a suit for damages is the acceptance of the taking of the property held for public use.

Great Falls Mfg. Co. v. *Garland*, 124 U. S. 581, 595.

Dougherty v. *Chapman*, 29 Mo. App. 233, 242.

Fries v. *Wheeling & L. E. R. R. Co.*, 56 Ohio St. 135, 46 N. E. 516.

Syracuse Solar Salt Co. v. *Rome, W. & O. Ry. Co.*, 22 N. Y. S. 321, 67 Hun. 153.

McClinton v. *Pittsburgh, Ft. W. & C. Ry. Co.*, 66 Pa. 404.

City of Elgin v. *Goff*, 38 Ill. App. 362.

ARGUMENT.

In this case it is not questioned that the title to the property through which the government made its navigable channel was in the plaintiff in error, and that the government had taken plaintiff in error's property for public use, nor that the value of the property so taken was $7,547.

The United States courts have adopted and approved of the familiar rule that when the owner accepts the taking by the government of his property for public use an implied contract arises by virtue of the constitutional amendment, whereby the government agrees to pay the plaintiff in error his just compensation, namely, the value of the land so taken.

Great Falls Mfg. Co. v. *Garland*, 124 U. S. 583, 597, 598.

Great Falls Mfg. Co. v. *U. S.*, 112 U. S. 645, 656.

United States v. *Lynah*, 188 U. S. 445, 463.

United States v. *Welsh*, 217 U. S. 333.

United States v. *Grizzard*, 219 U. S. 180.

In the above case of *Great Falls Mfg. Co.* v. *Garland, supra*, Judge Harlan said:

> "Even if the secretary's survey and map, and the publication of the attorney-general's notice, did not, in strict law, justify the former in taking possession of the land and water rights in question, it was competent for the company to waive the tort and proceed against the United States, as upon an implied contract,

> it appearing, as it does here that the government recognizes and retains possession taken in its behalf for the public purposes indicated in the act under which its officers have proceeded."

It is no answer to our contention that because the land of the plaintiff in error had been artificially excavated without his knowledge or consent and the water was flowing over the same, the government had a right to dredge a channel across it without paying compensation therefor.

Our contention is fully sustained by the cases cited in our brief that plaintiff in error had a right to reclaim his land, but for convenience of the court we quote some excerpts from the same.

In *Mulry* v. *Norton*, 100 N. Y. 424, 3 N. E. 581, 53 Am. Rep. 260, the court said:

> "It is equally true, however, that when water disappears from the land, either by its gradual retirement therefrom, or the elevation of the land by avulsion or accretion, or even the exclusion of the water by artificial means, his proprietorship returns to the original reparian owner. Neither does the lapse of time, during which the submergence continues, bar the right of such owner to enter upon the land reclaimed and assert his proprietorship."

This doctrine of the *Mulry* v. *Norton*, and also the *Morris* v. *Brooke* (an unreported case arising in 1815 in Delaware), was quoted with approval and followed in Illinois in *City of Chicago* v. *Ward*, 169 Ill. 392, 407, 48 N. E. 927, and also in *Commissioners of Lincoln Park* v. *Fahrney*, 250 Ill. 256, 266. It was also approved by the Supreme Court in *City of*

Philadelphia v. *Stimpson*, 223 U. S. 605, wherein on page 624 Mr. Justice Hughes said:

> "Where the stream suddenly and perceptibly abandons its old channel, the title is not affected, and the boundary remains at the former line." (Citing numerous cases.)

Also in the case of *City of St. Louis* v. *Rutz*, 138 U. S. 226, wherein the Supreme Court approves of the *Mulry* v. *Norton* doctrine.

Nor is it any answer to our contention that the government is exercising its right under the Commerce Clause of the Constitution in improving the navigability of the north branch of the Chicago river.

When Congress passed its River and Harbor Act of June 3, 1896, and amended the same by its Act of 1899, for the purpose of improving the North Branch of the Chicago river as far north as Belmont avenue, by dredging the same to a depth of 21 feet, it must be presumed that the government had in mind the dredging of the channel shown by the survey of 1837, and had this been done, the plaintiff in error would not have any complaint by reason of his property being taken.

The Supreme Court, in the case of *West Chicago Street Railway Co.* v. *People*, 201 U. S. 506, on page 524, quotes with approval the principle as declared by Gould in his works on waters, section 86, as follows:

> "The principle is thus declared by a leading text writer. The privilege of navigation upon all waters which are capable of such use in their natural condition, and are accessible without trespassing upon private lands, is a common and paramount right."

Again, in the case of *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, on page 336, the court holds that the right to improve the navigability of a river is supreme, and continues saying:

> "But like other powers granted to Congress by the constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the 5th amendment we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if in exercising that supreme control it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this 5th amendment, and can take only on payment of just compensation."

Again, in the case of *B. & O. R. R. Co.* v. *Maryland,* 88 U. S. 456, on page 470, the court said:

> "Maritime transportation requires no artificial roadway. Nature has appropriated, to hand, that portion of the instrumentality employed. The navigable waters of this earth are recognized public highways of trade and intercourse."

In the case of *Improvement Co.* v. *Sassaman,* 67 Pa. 415, where the charter of the company authorized the improvement of a stream "by removing obstructions, deepening it and protecting its bank, so as to make it a flowing stream," and "not to extend the means of the flow beyond the natural flow of the water of the creek," the court said:

> "The authority to improve the stream and make it navigable within the natural flow of the stream, gives no power to act outside of the channel of the stream, or to interfere with the riparian owners."

In 1 Lewis on Eminent Domain (3d Ed.), Sec. 85, the author says:

> "The public right is a right of passage only, including the right to improve navigation. It is necessarily limited to the bed of the stream."

In the case of *Weaver* v. *Miss. & Rum. River Boom Co.*, 28 Minn. 534, 11 N. W. 114, it was said:

> "The state has not the right, without making compensation, to take or destroy the property of riparian owners in making a water course navigable, when it is not so by nature, or in appropriating such water course to the public use by artificial erections or improvements. (Angell, Water Courses, Sec. 541.) * * *
>
> "We find no case where the public was held to have the right to overflow or otherwise take or use private property, or property outside the bed of the stream, for any such purpose, without making compensation therefor."

In the case of *Brown* v. *United States,* 81 Fed. 55, on page 57, the court said:

> "When the government, for the purpose of adding to the navigability of the stream, changes its natural channel, and in so doing occupies and assumes exclusive possession of the land of the citizen, it takes private property for public use, and must compensate the owner for the value of the property thus taken from him. The idea of a servitude is that it must be enjoyed in common with the owner of the servient tenement. The existence of the latter is essential to the co-existence of the former. When they both become vested in the same person, the dominant tenement becomes extinguished, but where the possessor of the dominant tenement ousts the owner of the servient tenement, and himself assumes exclusive use and enjoyment of the land which was subject to the servitude, the servitude is extinguished."

Nor can the provision of the Tucker Act,

> "That no suit against the government of the United States shall be allowed under this act, unless the same shall have been brought within six years after the right accrued, for which the claim is made (24 St. L. 505),"

have the effect of depriving the plaintiff in error of his just compensation herein.

It is elementary that the title to property taken for public use does not pass under our constitution, until compensation has been made therefor.

Chief Justice Waite, in *Kennedy* v. *City of Indianapolis,* 103 U. S. 599, on pages 603 and 604, speaking of the Indiana Constitution, which is in substance the same as the 5th amendment, says:

> "Not to multiply cases further, it seems to us that both on principle and authority the rule is that under such a constitution as that of Indiana, that the right to enter on and use property is complete, as soon as the property is actually appropriated under the authority of law for public use, but that the title does not pass from the owner without his consent, until just compensation has been made to him."

This doctrine is approved in *Cherokee Nation* v. *So. Kas. R. Co.,* 135 U. S. 641, where the court said:

> "But clearly the title does not pass until compensation is actually made to the owner. Within the meaning of the constitution the property, although entered upon, pending the appeal, is not taken until the compensation is ascertained in some legal mode, and, being paid, the title passes from the owner."

Speaking of a suit for compensation for property taken for public use, Lewis in his work on Eminent Domain, 3rd Ed., Sec. 889, says:

> "A recovery in such a suit vests the right to the lands in the defendant, and the record should properly describe the land and show that the suit is for just compensation."

It is also the correct rule that where land has been taken for public use without just compensation, the owner's right thereto is not barred, except by adverse possession for the prescriptive period.

Lewis, in his work on Eminent Domain (3rd Ed.) Volume 2, Sec. 966, lays down this rule as follows:

> "Where the constitution, either expressly, or as interpreted by the courts, requires compensation to be first made for property taken for public use, a law which casts the initiative upon the owner, and requires him to prosecute his claim for compensation within a time limited, or be barred, is invalid. Where, under such a constitution, property is appropriated for public use, without complying therewith, the owner's right to compensation is not barred, except by adverse possession for the prescriptive period. In Pennsylvania, where the constitution requires compensation to be first made or secured, it is held that the right to compensation is not barred by any length of time, but that after 20 years there is a presumption of payment, as in case of all obligations for the payment of money, which must be overcome by proof. But generally, the adverse possession of land for public use for the prescriptive period is held to bar the owner's right to compensation."

A recent case, *Faulk* v. *Mo. River & N. W. Ry. Co.*, 28 So. Dakota 1, 32 N. W. 233, reviews the numerous cases on this subject-matter, and concludes saying:

> "While there seems to be some conflict in the decisions, we are of the opinion that the views expressed by the Supreme Courts of Pennsylvania, New Jersey, New York, Nebraska, Mississippi, and the learned author on the subject-matter of eminent domain before referred to, state the true and correct rule, for as was said by the Supreme Court of Nebraska in *Kime* v. *Cass County, supra,* 'If it was competent for the legislature to make any provisions limiting the time for commencing an action by the owner, it could make such provisions as would effectually abrogate and fritter away the rights granted by the constituion.' The trial court was, therefore, clearly right in holding that the plaintiff's action was not barred by the statute of limitations, as the prescriptive period of 20 years had not elapsed."

From the findings of fact (transcript of record 10) it will appear the plaintiff in error, as soon as he knew of his property being taken by the government,

> "immediately made a demand upon the government for the possession of his property, which was refused."

This was in the month of February, 1910, and that he then elected to sue the government under the provisions of the Tucker Act, and accordingly filed his petition for such purpose on April 6, 1911.

The right of the plaintiff in error upon which this claim for compensation is made, accrued to him when the government refused to deliver his property back to him and he elected to sue for compensation and therefore the six-year limitation is not pertinent to the case at bar.

Commencing a suit for damages has been held to be the acceptance of the taking on the part of the owner.

Great Falls Mfg. Co. v. *Garland*, 124 U. S. 581, 595.

Dougherty v. *Chapman*, 29 Mo. App. 233.

This is the evidence of plaintiff in error's election.

In *Fries* v. *Wheeling & L. E. R. R. Co.*, 56 Ohio St. 135, 46 N. E. 516, the court held that where the land was used by a railroad company for its right of way, the land owner having the right either to sue for compensation or compel an appropriation of the land, and brings an action for compensation within 21 years from such occupation and it does not appear that his election to sue for compensation was not made within 6 years before the commencement of the action, the petition is not demurrable on the ground that the cause of action did not accrue within 6 years.

In the case of *Syracuse Solar Salt Co.* v. *Rome, W. & O. Ry. Co.*, 67 Hun. 153, 22 N. Y. Supp. 321, it was held that the fee title in an abutting owner, unless the company compensated him for its appropriation, was such that a lapse not continued for so long a time as to give title by adverse possession, and not accompanied by circumstances amounting to an estoppel, constituted no defense to an action for an injunction against the railroad company in the operation of its road.

In the case of *McClinton* v. *Pittsburg, Ft. W. & C. Ry. Co.*, 66 Pa. 404, it was held that where a rail-

road company located its tracks on private property, without paying for the property taken, the statute of limitations did not bar an action for subsequent use of the property.

In the case of *County of York* v. *Rolls*, 27 Ont. App. 72, it was held that where a stream through an extraordinary flood, washed away part of the land of the riparian proprietor, he is entitled at any time before the prescriptive right, or a right by estoppel to keep the stream in its new channel is acquired against him, to turn the stream back to its original channel.

In the case of *City of Elgin* v. *Goff*, 38 Ill. App. 362, it was held in an action against the city for the conversion of stone belonging to the plaintiff, that the statute of limitations did not commence to run until the city appropriated the stone to its own use by prohibiting the plaintiff from removing it.

In the case of *Douherty* v. *Chapman*, 29 Mo. App. 233, 242, it was held that where the plaintiff waives the tort, and sues in assumpsit, his right to the proceeds of the converted property accrues at the moment of his election.

Another suggestion we offer in this behalf is that the statute of limitations was not raised by the answer of the respondent herein, and we think it very questionable about the same being jurisdictional.

The improvement by the government contemplated a completed project. The government passed an appropriation by the Act of June 3, 1896,

> "for improving the Chicago River in Illinois from its mouth to the stockyards on the south

branch, and to Belmont avenue on the north branch, so far as it may be permitted by existing docks and wharves, which may be dredged to admit the passage of vessels drawing 16 feet of water," etc.

Chap. 314, Statutes 1896, 1st Sess., page 228.

Afterwards in 1899, an appropriation was made for a survey of the same, changing its provision as to depth to 21 feet.

Chap. 425, Statutes 1899, 3rd Sess., page 1156.

Other appropriations were made in 1900, 1902, 1907 and in 1908, it was provided "that the unexpended balance of the amount heretofore appropriated for Chicago harbor, or so much thereof as may be deemed advisable, be and the same is hereby made available in the discretion of the Secretary of War for expenditure on the existing project for Chicago river."

Chap. 213, Statutes 1908, Part 1, page 429.

From the findings of fact (Trans. of Rec. 10), it appears that some of the work was done in 1899, but was not completed until 1909, within six years from the commencement of this proceeding.

In the case of *Brower* v. *City of Philadelphia*, 8 Pa. Co. Ct. Rep. 361, the court said:

> "While the landlord may, if he wishes, bring suit at the time of the taking of his land, his rights are not finally fixed, and the statute does not begin to run against him until the work has been completed."

It is immaterial to the questions involved herein whether or not the North Branch of the Chicago

river was navigable in its natural state, or was so made by the improvement made by the riparian owners.

The plaintiff in error is claiming damages for his property taken by the government, which admittedly did not form a part of the bed of the North Branch of the Chicago river in its natural state, or in the state in which it had been improved by the riparian owners.

The methods of acquiring and losing title to real estate, viz.: title by descent and title by purchase, have been approved and adopted since the time of Blackstone, as has also the different methods embraced in the word "purchase," viz.: (1) escheat; (2) occupancy; (3) prescription; (4) forfeiture; (5) alienation.

2 Black. Comm. 201, 244, 258, 262, 263, 267, 273, 278; 32 Cyc. 680.

It cannot be reasonably contended that the title of the plaintiff in error has been transferred to the government by any of these modes recognized, and such title and right to exclusive possession remained in the plaintiff in error until he accepted of the taking by the government after their refusal to return him his property, by the filing of the petition herein. Nor can it be contended that the plaintiff in error, by any principle of estoppel, is prevented from asserting his legal right. The record affirmatively shows that the possession by the government of his property did not come to his knowledge until February, 1910, and that he immediately made a demand upon the government for the possession of his property, which was refused.

Estoppel by acquiescence is always predicated upon full knowledge of the facts, which is entirely absent herein. See:

Decorah Woolen Mill Co. v. *Greer,* 49 Ia. 490.

Stone v. *Roscommon Lumber Co.,* 59 Mich. 24, 26 N. W. 216.

Mulrein v. *Weisbecker,* 56 N. Y. S. 240.

Knight v. *Albemarle & R. R. R. Co.,* 111 N. C. 80, 15 S. E. 929, 930.

We respectfully submit that the government has taken the plaintiff in error's property; that as soon as the knowledge of such taking came to him he made a demand for the possession of the same, which was refused him by the government; that he then elected to accept of the taking and sue the government for his compensation; that the petition covers all the jurisdictional facts required by the so-called Tucker Act; that the measure of damages was properly found; that if the finding of the damages is not accurately stated in the findings of fact, it is accurately stated in the refused requests, and supported by the uncontradicted evidence in the record, making this a question of law, that this case should be reversed, and remanded with directions to the District Court to enter judgment in favor of the plaintiff in error, and against the government for $7,547 with interest.

TIMOTHY F. MULLEN,
Attorney for Plaintiff in Error.

THOMAS B. LANTRY,
Of Counsel.

FILED
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JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1917.

No. [redacted]29

FRANZ TEMPEL,
Plaintiff in Error,

vs.

THE UNITED STATES,
Defendant in Error.

In Error to the District Court of the United States for the Northern District of Illinois.

REPLY BRIEF OF PLAINTIFF IN ERROR.

TIMOTHY F. MULLEN,
Attorney for Plaintiff in Error.
THOMAS B. LANTRY,
Of Counsel.

CHAMPLIN LAW PRINTING CO.

IN THE

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FRANZ TEMPEL,
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In Error to the District Court of the United States for the Northern District of Illinois.

REPLY BRIEF OF PLAINTIFF IN ERROR.

Counsel for the United States, under his heading "The Facts" has omitted certain elements set forth on pages 2 to 10, inclusive, of our original brief and argument, among which we direct the court's attention to the fact that that portion of the North Branch of the Chicago river in question in this case in its natural state was a small surface stream which in the spring time would accommodate the floating of logs or travel by canoes or row boats and in the summer time there was very little water whatso-

ever in the channel (Rec. 8-9; Finding 5); that the riparian owners at the time of the plaintiff in error's purchase had excavated the channel which had been surveyed by the Government in 1837, and this channel was being publicly used for the purpose of navigation to accommodate boats of 8 or 9 feet in breadth (Rec. 9; Finding 7); that plaintiff in error at the time he purchased the premises in question had a survey of the same made, which was introduced into evidence and showed the edge of the bank and the water line (Rec. 8; Finding 6). This is material in construing the meaning of the words "in front" of the Tempel property, contained in the findings.

While the finding as to the measure of damages is inaccurately stated (see Rec. 10; Finding 16) it was correctly submitted to the court (Rec. 13; Requested findings of fact 1 and 2) and is supported by the evidence of the witnesses (Rec. 16).

Counsel for the United States in that portion of his brief entitled "Argument" has suggested several propositions which, we respectfully submit, do not touch the point in the matter of the errors complained of in this case, and we will briefly suggest our reasons therefor, following the headings contained in counsel's "Argument."

I.

"The Chicago river being a navigable stream in its natural state, there was no taking by the Government because the submerged lands were subject to the paramount right of the Government to improve navigation."

The argument of counsel under this heading has no application to the case at bar. We do not contend that the Government had not a paramount right in the improvement of navigation over the bed of the Chicago river in its natural state, but it does not follow that the Government has a paramount right to take the upland or land artificially submerged of a riparian owner without paying him just compensation therefor. (See cases cited original brief and argument p. 18.)

II.

"In improving navigation upon the Chicago river the Government was not confined to the channel shown by the survey of 1837, but might dredge any portion of the river bed."

The argument of counsel under this heading is based upon the right of the Government to improve the Chicago river wherever the actual river bed shifts or is altered by reason of natural causes. We do not contend that the Government had not the right to improve the bed of the river wherever the same had shifted naturally by gradual or imperceptible erosion and we submit that

the case of *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, does not hold anything to the contrary. There is nothing in this case or in the citation from Farnham on Waters and Water Rights under this heading which indicates that the court or text writer had in mind the shifting of the channel, due to any causes other than natural causes. The *Stimson* case recognizes the doctrine that where a stream suddenly and perceptibly abandons its own channel, the title is not affected and the boundary remains at the former line. See page 624 of opinion. Also see page 627 of the opinion where the court said:

> "The present case falls within the category first mentioned and according to general principles of law the owner would bear the loss caused by the washings of the river."

As to the complaint of the plaintiff in error based upon the erection of the dam, the court said, page 627:

> "We are not concerned here with the question whether there was any appropriation of land of the former owner by the United States and a cause of action arose to recover its value."

It is no answer to our claim for compensation under the Constitutional Amendment that plaintiff in error may have a right of action against his lessee for the lessee's tortious act.

It may be true that if plaintiff in error had done the dredging himself he would be estopped to make the claim he is now asserting, but the act of his lessee was done without his knowledge or consent, against his express order and in violation of an express covenant pertaining thereto.

Counsel objects to the presumption indulged in our original brief and argument that the Government had in mind the dredging of the channel shown by the survey of 1837. We submit that this presumption is well taken. The Government would have the right to make improvements for the purpose of navigation in any portion of the actual river bed as the same shifted by reason of natural erosion, but not where the same had been changed by artificial means without the consent of the owner.

III.

"Such injury if any as claimed has suffered in this case was occasioned by the act of his lessee, Zapel, and his remedy is to be sought in an action against him."

Under this heading counsel contends that the wrongful act of the lessee was the proximate cause of the damage to plaintiff in error's land. This may be true, but such act being tortious and unknown to the plaintiff in error has no bearing on the relief asked for in this case. We are not basing our claim upon the tort of any person, but are asking compensation for a taking of property for public use based upon a contract made by the Constitutional Amendment. The case of *Druley* v. *Adam*, 102 Ill. 177, 206, 207, pertains to the right of the lower riparian proprietor in running water and obviously has no pertinency to the case at bar. The case of *Hocutt* v. *W. & W. R. R. Co.*, 124 N. C. 214, 219, 221, was a case brought by the owner of land

against the railroad company for unlawful diversion of water and consequently sounded in tort. Neither of these cases involved the question of a contract between a Government and an owner of property taken for public use made by a constitution. The citation from Farnham on Water and Water Rights (1904, Vol. 1, Sec. 79a, p. 379) is based upon the case of *Velte* v. *United States*, 76 Wis. 278, 284.

In the *Velte* case the question determined was whether interest should be allowed respondent from the time the land was permanently overflowed or from the date of the appraisal by the commission. The court held it should be fixed as of the former time, but on account of the statute was limited to six years prior to the commencement of the suit. This conclusion would necessarily follow because the Government had the use of the land from the time the same was permanently overflowed. The holding of the court contended for by counsel was merely a part of the court's reasoning to justify its holding.

This case was one of a number of cases brought in the Wisconsin state courts under the authority of the Act of March 3, 1875, Chap. 166, 18th U. S. St. L., Part 3, p. 506, which provided among other things:

> "That whenever, in the prosecution and maintenance of the improvement of the Wisconsin and Fox rivers in the State of Wisconsin, it becomes necessary or proper in the judgment of the Secretary of War to take possession of any lands or the right of way over any lands, for canals and cut-offs, or to use any earth-quarries or other material lying adjacent

> or near to the line of said improvement and needful for its prosecution or maintenance, the officers in charge of said works may, in the name of the United States, take possession of and use the same, after first having paid or secured to be paid the value thereof, which may have been ascertained in the mode provided by the laws of the state wherein such property lies. In case any lands or other property is now or shall be flowed or injured by means of any part of the works of said improvement heretofore or hereafter constructed for which compensation is now or shall become legally owing, and in the opinion of the officer in charge it is not prudent that the dam or dams be lowered, the amount of such compensation may be ascertained in like manner. The Department of Justice shall represent the interests of the United States in legal proceedings under this act, and for flowage-damages hereinbefore occasioned."

From the foregoing it will appear that the decision of the *Velte* case is a construction of the Wisconsin statute, and is therefore not of controlling effect on the principle for which it is cited by counsel for the Government.

A Wisconsin case invoving this same act, more in point, is the case of *Green Bay & M. Canal Co.* v. *Kaukauna Water Power Co.*, 70 Wis. 635, where an action was brought to restrain the defendants from drawing water from a canal which was a part of the improvement affected by said Act of March 3, 1875, above mentioned and to compel the defendant to restore an embankment which it had removed, or permit the plaintiff to do so.

The improvement had been made under an act of the State of Wisconsin passed in 1848, which made

no provision for compensating the owners of property taken for the improvement. A part of the improvement was the erection of a dam on property, called in the opinion, "Lot 5," and an embankment to keep the water within the channel of the river. At the time of the construction of the improvement no authority had been received from the owner of lot 5 to erect or abut the dam on that lot or to build an embankment in front of it and no condemnation proceedings under the Act of 1848 to obtain an appraisal of the damages to such lot were proved on the trial. The defendant in 1881, commenced to build a canal and attempted to cut the embankment of the river on lot 5 and lot 6 and to draw water for hydraulic purposes from the pond made by the dam in question.

The United States in 1876, had erected a new dam which flooded the old dam and rendered it useless. The controlling question in the case was whether the defendant had the right to cut the embankment on lots 5 and 6 and draw water from the pond made by the Kaukauna dam, and the court drew its conclusion from several questions discussed in the opinion, as to one of which it said (page 656):

> "It seems quite clear that no statute of limitations has run against the right of the present owner of lot 5, to recover of the United States compensation for the portion of that lot taken for the improvement, and for the injury to the lot caused thereby. The act of congress giving such compensation was approved March 3, 1875, and it provided for the payment of such claims legally owing at that date. The act, by its terms, provides for cases in which 'compensation is now or shall become legally owing.' Of

course, it speaks from the date of its approval. The original Kaukauna dam was not erected on lot 5 until after March 3, 1855. This satisfactorily appears by the testimony of Hon. Morgan L. Martin, who erected the dam. He testified, in substance, that he entered upon the bed of the stream for the construction of the dam after warm weather commenced in the spring of 1855. Of course, in the latitude of Kaukauna, that must have been later than March 3rd. We suppose the right to compensation was not cut off until a prescription right to maintain the dam had matured by 20 years' adverse user. Hence, when the act of March 3, 1875, was passed, compensation was owing to the owner of lot 5 for the taking of and injury to his property, which is still a valid claim against the United States. And this, we think, includes any deprivation or interruption of any legal riparian right."

This case was reversed and remanded with directions to give judgment to the plaintiff as indicated in the opinion.

Afterwards a writ of error was sued out in the United States Supreme Court to review the decree that was entered pursuant to the directions contained in this opinion and for an injunction restraining the defendants from taking water from the pond, and was affirmed by the Supreme Court in 142 U. S. 254.

The opinion, however, does not specifically pass upon this question of limitations.

We have in our original brief (pages 19 to 23) directed the court's attention to the correct rule on this subject-matter, citing:

Lewis on Eminent Domain, 3rd Ed., Vol. 2, Sec. 966.

Faulk v. *M. R. & N. W. Ry. Co.*, 28 S. D. 1.
Syracuse Solar Salt Co. v. *R. W. & O. Ry. Co.*, 67 Hun, 153.
Fries v. *W. & L. E. R. R. Co.*, 56 Ohio State, 135.

If, as it must be conceded, the payment of compensation is a condition precedent required of the Government before the taking of property for public use and the taking of the same by the Government without complying with such condition precedent, affords the property owner an opportunity of accepting the same and by such acceptance an implied contract is created, then correct reasoning forces the conclusion that the cause of action commences when such taking is accepted by the property owner; and as the Tucker Act contemplates only claims founded upon contracts as distinguished from tort, the words "six years after the right accrued" for which the claim is made, means six years after the plaintiff in error accepted of the taking.

IV.

"The District Court correctly held that it was without jurisdiction because the suit was instituted more than six years after the alleged right of action accrued."

Under this heading counsel argues that the provision of the Tucker Act that the suit must be brought within six years after the right accrued for which the claim is made is jurisdictional and the cases cited seem to sustain this contention; but

it does not follow that the six years begin to run as soon as it was possible for the plaintiff in error to have accepted of the taking and to begin his suit. It would be quite proper for the plaintiff in error, had he known that the channel had been run through his property, to await the prescription period expecting that the Government might change its channel to the proper river bed and relieve his property, his right of reclamation remaining in him until the expiration of the prescription period. He was not called upon to ratify the action of the Government and accept of its acts in the premises unless he saw fit so to do. His acceptances necessarily required an affirmative act upon his part in order to create the contract upon which this claim is based. This he did not do until he filed his suit. As a matter of fact, in February, 1910, he demanded back his property and was refused the same by the Government.

The various cases of the Court of Claims cited by counsel are clearly distinguishable from the case at bar.

The case of *Rice* v. *U. S.*, 21 Ct. Cls. 413, Affd. 122 U. S. 611, was founded on an act compensating persons for captured property, and the proceeds of the claimant's property were in the United States treasury.

The case of *Cen. Pac. R. R. Co.* v. *U. S.*, 24 Ct. Cls. 145, was founded on a claim that the Secretary of Treasury was improperly withholding money rightfully belonging to the plaintiff.

The case of *Curtis* v. *U. S.*, 34 Ct. Cls. 1, was a claim for deduction made by the Treasury Depart-

ment at the time of the completion of a contract with the Government.

The case of *Hartman* v. *U. S.*, 35 Ct. Cls. 106, involved a claim founded upon a royalty for the use by the Ordnance Bureau of claimant's patents.

Green's case, 17 Ct. Cls. 174, was a claim for rent.

These cases have no bearing upon the issues raised in this writ of error. It cannot be contended that the payment of compensation is not a condition precedent to the Government taking plaintiff in error's property or that his acceptance of the taking was not a necessary prerequisite to the implied contract upon which this proceeding is based.

In none of these cases cited by counsel under this heading were those principles involved.

In conclusion, we submit this case should be reversed with directions to the District Court to enter a judgment against the United States for the value of the property taken.

TIMOTHY F. MULLEN,
Attorney for Plaintiff in Error.

THOMAS B. LANTRY,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

FRANZ TEMPEL, PLAINTIFF IN ERROR,
v. No. 201
THE UNTED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is a suit under the Tucker Act, 24 Stat. 505, brought against the United States in the District Court of the United States for the Northern District of Illinois for damages occasioned by the alleged taking of a certain part of claimant's property in the improvement of the North Branch of the Chicago River, without payment of just compensation, in violation of the Fifth Amendment to the Constitution (R. 1–4).

Answer was filed by the United States (R. 5–6), replication by claimant (R. 7), and the cause was tried before the District Judge without a jury.

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THE FACTS.

From the findings of fact made by the District Court (R. 8–11), it appears that in 1889 claimant became the owner of certain property situated along the northeast bank of the North Branch of the Chicago River, between Western and Belmont Avenues, in the city of Chicago, Illinois (R. 8–9; Findings 1–5); that said branch, at the point where the property is situated, was originally surveyed by the United States in 1837, and at that time was about 50 feet in width (R. 9; Finding 5).

After claimant became the owner of the property, he leased the same to one Zapel for a brick yard. By the terms of said lease the lessee was permitted to dredge the river in front of claimant's land for the purpose of making brick from the clay contained therein; but said lease covenanted that the lessee, in his dredging operations, should not disturb claimant's upland and further that the lessee should yield up the premises in the same condition as they were demised. Zapel, without knowledge or consent on the part of claimant, (*a*) caused the dredging company which he had employed to dig away claimant's upland to a depth of 14 feet, the result of which was to cause the water to become diverted and to flow over that portion which was dredged away, thereby widening the river in front of claimant's land in some places to 60 feet, and varying in depth from 6 to 14 feet; and (*b*) said dredging company was employed in so dredging about 30 times during a period of 5 years, and each time was so engaged in actual

dredging during periods ranging from 2 hours to 4 days (R. 9; Findings 8–9).

Subsequent to these dredging operations and in 1896, the river in front of claimant's land was in varying depth from 6 to 15 feet and was used by boats drawing from 5 to 8 feet of water (R. 10; Findings 11–11½). In that year Congress passed an act providing for the dredging of the North Branch of the Chicago River to admit the passage of vessels drawing 16 feet of water, the channel to be 17 feet in depth, and in 1899 another act providing for the survey and estimate of cost for a channel 21 feet in depth (R. 9–10; Finding 10).

Thereafter, and in 1899, the United States dredged a channel to the depth of 17 feet, some 30 feet in width, and subsequently, and in 1909, redredged to a depth of 21 feet and 60 feet in width, all by and under sundry appropriations made by Congress for such purposes between 1898 and 1909 (R. 10; Finding 12). In deepening the channel the United States surveyed and located the same upon the submerged land of claimant, where it had been dredged out by the dredging company pursuant to authority given by Zapel, claimant's lessee (R. 10; Finding 13).

Claimant had no knowledge of the dredging by the United States nor had he any knowledge of the location of the river upon his land until some time in February, 1910, when he immediately made demand upon the United States for possession of his property, which was refused (R. 10; Finding 14); nor did he make any objection to the use of the river in front

of his premises for public navigation, nor any complaint of the dredging by the United States in 1899 (R. 10; Finding 18).

During the period 1899 to 1909, the North Branch of the Chicago River, including that portion in front of claimant's land, was in constant and increasing use for the purposes of navigation (R. 10; Finding 19).

No compensation has been made to claimant (R. 10; Finding 15), and the difference between the value of the land in 1889 and at the time of his demand for the return of possession of that part alleged to have been taken is $7,547 (R. 10; Finding 16).

Claimant insisted in the lower court that the foregoing facts constituted a "taking" by the United States of his property for public use, and the Government thereby became, under an implied contract, liable to pay for the value thereof.

CONCLUSIONS OF LAW BY THE LOWER COURT.

Upon the facts found, the District Court adopted, among others, the following conclusions of law (R. 12–13):

1. That the North Branch of the Chicago River in its natural state, as also in 1889, was in fact a navigable stream.

2. That the suit being one under the Tucker Act, the court was without jurisdiction because the claim for the land alleged to have been taken by the Government as the result of the dredging by it in 1899 arose prior to the six-year limitation of that act.

3. That title to the bed of the stream, whether in the State of Illinois or claimant, was subject to an easement in favor of the United States, and any damage caused to the bank along the shore by dredging the bed is incidental and consequential, for which the Government is not answerable.

4. That the dredging of the bottom of the river in 1899 and 1909 did not constitute a taking of claimant's property within the meaning of the Fifth Amendment to the Constitution.

ASSIGNMENTS OF ERROR.

The assignments of error will be found at pp. 22–25 of the record. They are set out in much detail, but the main proposition which they assert is that the facts of the case constitute a "taking" by the Government of private property for public use without the payment of just compensation.

ARGUMENT.

I.

The Chicago River being a navigable stream in its natural state, there was no taking by the Government because the submerged lands were subject to the paramount right of the Government to improve navigation.

It is settled that the servitude of lands on the banks and in the bed of a stream to the paramount right of the Government to improve for navigation is confined to such streams as in their ordinary and natural condition are susceptible of valuable public

use in navigation. *United States* v. *Cress*, 243 U. S. 316. That the Chicago River is a stream which in its natural state was susceptible of navigation is indisputable. Indeed, several years prior to the purchase by claimant of the land herein involved, and as long ago as 1882, this court, in the case of *Escanaba Co.* v. *Chicago*, 107 U. S. 678, 683, declared:

> The Chicago River *and its branches must, therefore, be deemed navigable waters of the United States*, over which Congress under its commercial power may exercise control to the extent necessary to protect, preserve, and improve their free navigation. [Italics ours.]

See also: *Harman* v. *Chicago*, 147 U. S. 396, 404.

The technical title to the beds of navigable rivers of the United States is either in the States in which the rivers are situated, or in the riparian owners, depending upon the local law. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 60.

Under the law of Illinois, a grant of land bordering on a river, whether the river be navigable or not, extends to the thread of the stream. *St. Louis* v. *Rutz*, 138 U. S. 226, 242. But this title to the submerged lands is a qualified one subordinate to the paramount right of the Federal Government to improve navigation. When the Government exercises this right over the submerged lands there is no taking within the meaning of the Fifth Amendment. *West Chicago Railroad* v. *People*, 214 Ill. 9, 20, 21; affirmed *West Chicago Railroad* v. *Chicago*, 201 U. S. 506, 520. This declaration is in line with the consistent ruling

of this court reiterated in the case of *Willink* v. *United States*, 240 U. S. 572, 580, in the following language:

> The river being navigable * * * whatever rights he [claimant] possessed in the land below the mean high-water line were subordinate to the public right of navigation and to the power of Congress to employ appropriate means to keep the river open and its navigation unobstructed. [Citing many cases.]

II.

In improving navigation upon the Chicago River the Government was not confined to the channel shown by the survey of 1837, but might dredge any portion of the river bed.

Claimant contends that in providing for the improvement of the Chicago River in 1896 and 1899 (brief, p. 16)—

> * * * it must be presumed that the government had in mind the dredging of the channel shown by the survey of 1837, and had this been done, the plaintiff in error would not have any complaint by reason of his property being taken.

The Government admits no such presumption, but asserts, on the contrary, that the right to make improvements for the purpose of navigation extends to to every portion of the actual river bed and shifts as the river bed itself is altered.

> Nor is the authority of Congress limited to so much of the water of the river as flows over the bed of forty years ago. The alterations

> produced in the course of years by the action of the water do not restrict the exercise of Federal control in the regulation of commerce. Its bed may vary and its banks may change, but the Federal power remains paramount over the stream, and this control may not be defeated by the action of the State in restricting the public right of navigation within the river's ancient lines. The public right of navigation follows the stream (Rolle's Abr. 390; *Carlisle* v. *Graham*, L. R. 4 Ex. 361, 367, 368) and the authority of Congress goes with it. [*Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 634].

While, as we have shown, the title of claimant as riparian owner extended in this case to the thread of the stream, all of the submerged portion of his land was affected with an easement in favor of the right of navigation. His upland also was subject to the shifting character of the river, and whenever by gradual and imperceptible erosion or accretion or other cause not amounting to a sudden and perceptible change in or engulfment of the upland the bank of the stream changed and the area of the submerged portion permanently increased he continued to hold title to the center of the stream, but the public right to navigate the overflowing water immediately attached. See *Philadelphia Co.* v. *Stimson*, *supra*, pp. 624, 634; Farnham on Waters and Water Rights, 1904, vol. 3, secs. 847, 848, pp. 2491, 2494.

In the case at bar it appears that as early as the year 1896 there was a depth of water in front of the

property in suit varying from 6 to 15 feet, which was used for purposes of actual navigation, and that it so continued, with such improvements as the Government made from time to time up to and including the bringing of this suit. If the dredging done by Zapel had been done by claimant himself and the water had been thus admitted to his land by his own voluntary act, he could not be heard to assert that the public right of navigation stopped at his original shore line. See *Dwinel* v. *Barnard*, 28 Me. 554, 562; *Dwinel* v. *Veazie*, 44 Me. 167. That the water was admitted by the tortious act of his lessee may give him a right of action under his contract of lease but can not lessen the rights of the public or of the Government.

III.

Such injury if any as claimant has suffered in this case was occasioned by the act of his lessee, Zapel, and his remedy is to be sought in an action against him.

The facts found in this case clearly demonstrate that if there was a taking of private property the actual taking was not occasioned by wrongful act on the part of the agents of the Federal Government, but primarily by the wrongful acts of claimant's lessee, Zapel, who violated the covenant of his lease not to disturb claimant's upland and whose acts were the proximate cause of the damage to claimant's land. *Druley* v. *Adam*, 102 Ill. 177, 206–207; *Hocutt* v. *W. & W. R. R. Co.*, 124 N. C. 214, 219, 221. The

time of taking was when the land was first permanently flooded and its value lessened or destroyed. Farnham on Waters and Water Rights, 1904, vol. 1, sec. 79a, p. 379; *Velte* v. *United States*, 76 Wis. 278, 284. Claimant's right of action, therefore, if any he had, was against Zapel for the latter's breach of the covenant of his lease.

IV.

The District Court correctly held that it was without jurisdiction because the suit was instituted more than six years after the alleged right of action accrued.

The Tucker Act provides (24 Stat. 505):

> * * * That no suit against the Government of the United States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made.

The same limitation is contained in section 1069 of the Revised Statutes.

It is settled that this provision is jurisdictional and limits the cases of which the Court of Claims and the District Courts of the United States exercising concurrent jurisdiction can take cognizance. *Finn* v. *United States*, 123 U. S. 227, 233; *United States* v. *Wardwell*, 172 U. S. 48, 52; *United States* v. *Utz*, 80 Fed. 848, 851; Rev. Stat., sec. 1069.

Again, a claim first accrues within the meaning of the Tucker Act (and Revised Statutes, sec. 1069), when a suit may first be brought upon it and from

that day the six years' limitation begins to run. *Rice* v. *United States*, 21 Ct. Cls. 413, affirmed 122 U. S. 611; *Central Pacific R. R. Co.* v. *United States*, 24 Ct. Cls. 145, 152; *Curtis* v. *United States*, 34 Ct. Cls. 1, 4; *Hartman* v. *United States*, 35 Ct. Cls. 106, 108.

Even though the statute of limitations was not set up in the answer filed by the Government in this case, it is settled that the general rule that limitation does not operate by its own force as a bar, but is a defense which must be set up to be availed of, does not apply to suits in the Court of Claims (and in District Courts exercising concurrent jurisdiction) against the United States; and it is clearly the duty of those courts to dismiss the petition of their own motion, when it appears that the claim is barred, although the statute may not have been pleaded. *Finn* v. *United States*, *supra*, pp. 232–233. See also: *Mosby* v. *United States*, 24 Ct. Cls. 1, 5–6.

It is contended that claimant was without knowledge of and did not give his consent to the dredging done by either his lessee or the United States. The answer to this contention is that his action is based upon an implied contract, and where an action is founded upon a contract ignorance upon the part of claimant as to the existence of his right of action does not suspend the running of the statute. *Green's Case*, 17 Ct. Cls. 174, 187.

It appears that the alleged taking of claimant's property was occasioned by the wrongful acts of his lessee; that said wrongful acts were the proximate cause of the damage to claimant's property; that his

right of action first accrued within the meaning of the Tucker Act when his upland became permanently submerged; that his right accrued prior to 1896, when the Government first inaugurated the contemplated improvement of the Chicago River; that the present suit was not instituted until 1911, at least 15 years after the wrongful acts of claimant's lessee; and it is submitted that the contention of claimant (brief, p. 19) that the limitation of the Tucker Act is inapplicable is wholly without merit.

The judgment of the District Court should be affirmed.

JOHN W. DAVIS,
Solicitor General.

OCTOBER, 1917.

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